





# San Francisco Law Library

No. 77040

Presented by

---

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.











1309

No. 3815

1310

United States  
1 1310  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

**Transcript of Record.**

Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

**FILED**

JAN 21 1922

**F. D. MONCKTON,**  
CLERK







United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Plaintiff in Error,

VS.

JOHN LARSON,

Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer .....	10
Answers to Questions Propounded to Jury ...	104
Assignment of Errors .....	97
Bill of Exceptions .....	33
Bill of Particulars .....	6
Bond on Writ of Error .....	86
Certificate of Clerk U. S. District Court to Original Judgment .....	104
Certificate of Clerk U. S. District Court to Transcript of Record.....	100
Certificate of Judge Allowing and Setting Bill of Exceptions .....	81
Citation on Writ of Error .....	91
Complaint .....	1

## EXHIBITS:

Plaintiff's Exhibit "N"—Deed Dated April 14, 1913, Between John Lund and Carolina Lund to Mrs. Mary Lar- son .....	38
Plaintiff's Exhibit "O"—Bill of Partic- ulars .....	46
Instructions of Court to the Jury.....	67
Judgment .....	102



Index.	Page
Motion to Direct Verdict .....	65
Names and Addresses of Attorneys of Record.	1
Order Allowing Writ of Error and Fixing Amount of Supersedeas and Cost Bond..	85
Order Extending Time Sixty Days to Forward Record on Appeal to U. S. C. C. A. (Dated July 13, 1921) .....	92
Order Extending Time Ninety Days to For- ward Record on Appeal to U. S. C. C. A. (Dated September 7, 1921).....	93
Order Extending Time Forty Days to For- ward Record on Appeal to U. S. C. C. A. (Dated November 22, 1921).....	95
Order Extending Time to and Including Janu- ary 10, 1922, to Forward Record on Ap- peal to U. S. C. C. A. ....	96
Petition for Writ of Error.....	83
Praecipe for Transcript of Record.....	99
Reply .....	28
 TESTIMONY ON BEHALF OF PLAIN- TIF:	
LARSON, JOHN .....	34
Cross-examination .....	58
Verdict .....	81
Writ of Error .....	89

**Names and Addresses of Attorneys of Record**

HELLENTHAL & HELLENTHAL, Juneau,  
Alaska,

Attorneys for Defendant in Error,

RODEN & DAWES, Juneau, Alaska,

Attorneys for Defendant in Error.

---

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Complaint.**

The plaintiff herein complains of defendant, and  
for his cause of action alleges:

**I.**

That during all the time herein mentioned de-  
fendant was, and now is a corporation, organized,  
existing and doing business as such.

**II.**

That plaintiff now is and during all the time  
hereinafter mentioned was the owner of the lower  
or southwesterly one-half of Lot No. 2 in Block  
“N” of the townsite of Juneau, said premises being

situated on the upper or northeasterly side of Gastineau Avenue in the City of Juneau, Division No. One, Territory of Alaska, and plaintiff has been the owner as well as the occupant of said premises for several years last past; that continuously for several years last past and until the destruction of the said premises on the 2d day of January, 1920, as hereinafter more fully described, there was upon said premises a frame building belonging to and occupied by plaintiff and his family as a residence and rooming house, which building was, before and up to the time of its destruction as hereinafter described, of the actual and reasonable value of three thousand eight hundred dollars (\$3,800.00); and that at the time of the destruction of said building, as hereinafter described, there were in said building and belonging to plaintiff, household furniture, household and kitchen utensils, sewing-machine, trunk, fishing gear, musical instruments, [1\*] ornaments, personal jewelry, clothing, money and other personal property belonging to the plaintiff, all of the actual and reasonable value of three thousand twenty dollars (\$3,020.00), all then and there in the possession of plaintiff.

### III.

That said premises are situated on the Westerly slope of a steep and high mountain, generally known and described as Mount Roberts, and at an elevation of approximately 100 feet above the waters of Gastineau Channel; that the grade of the said slope

---

\*Page-number appearing at foot of page of original certified Transcript of Record.



upon which said premises are situated, and from the lower side of said premises to the flume of said defendant company hereinafter described, is approximately 40 degrees from the horizontal; that said slope during all the time herein mentioned was covered with a heavy layer of soil, consisting principally of gravel, rocks, silt and decayed vegetable matter; that said soil was so composed and so situated on such slope that in case it became heavily saturated with water, or in case water in addition to the natural rainfall should be deposited upon the surface thereof, it would slide down hill and thus and thereby destroy the aforesaid frame building of plaintiff and everything therein contained: all of which facts above set out were at all times well known to defendant, its officers and agents.

#### IV.

That heretofore, and on or about the year 1914 or 1915, the defendant company, for its own benefit and for its own purposes, diverted a large quantity of the water of Gold Creek from its natural channel in Gold Creek Basin and conveyed the same to the westerly slope of Mount Roberts, and did so by conducting said water by means of a wooden flume or conduit through a tunnel through Mount Roberts and to a point on said slope directly above the plaintiff's premises above described and at an elevation of some 400 feet above the waters of Gas-tineau Channel and at an elevation of some 300 feet above the plaintiff's premises aforesaid. [2]

That the said use and diversion of said water by

defendant continued until after the 2d day of January, 1920, and the said tunnel, flume and conduit and all the means for the diversion and utilization of said water were constructed and installed by defendant, and during all the time herein mentioned and since the beginning of said diversion, said flume, tunnel, conduit, and all other means used in the diversion, conveyance, storing and utilization of said water, were operated and maintained exclusively by and were continuously in the exclusive possession, care, control and use of defendant, its agents and servants, until after the injury herein complained of.

#### V.

That the water so diverted by defendant, as above set out, on the 2d day of January, 1920, while this plaintiff was such owner and occupant of the premises aforementioned and in the possession of the same, either designedly on the part of the defendant company or by reason of defendant's negligence, escaped and flowed from said flume or conduit and was by the negligence of defendant, caused and permitted to be and become unlawfully deposited upon and to flow over and unto the said slope aforesaid, and over and upon plaintiff's said premises, and through and by the negligent or wilful acts of the defendant, said water, so diverted from Gold Creek flowed upon said slope, below said flume, and saturated the soil upon said slope, both above and underneath said building, and thereby and in that manner, and owing to the negligence and unlawful acts of defendant aforesaid, caused the said soil of

said slope and premises to slide down hill in the direction of Gastineau Channel, and thus and thereby destroyed the said premises belonging to plaintiff and completely demolished and destroyed the said frame building of plaintiff and all the aforementioned property within the said building, and thus and thereby rendered said premises, building and personal property absolutely worthless. [3]

## VI.

That by reason of said facts above set out and by reason of the negligence and unlawful acts of the defendant, this plaintiff was damaged in the sum of six thousand eight hundred twenty dollars (\$6,820.00).

WHEREFORE, the plaintiff demands judgment against defendant in the sum of six thousand eight hundred twenty dollars (\$6,820.00), together with his costs and disbursements in this action.

JOHN RUSTGARD,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

John Larson, being first duly sworn, deposes and says: That he is the plaintiff above named; that he has heard read the foregoing complaint and knows the contents thereof, and that he verily believes the same to be true.

JOHN LARSON.



Subscribed and sworn to before me this 6th day of May, 1920.

[Notarial Seal]

JOHN RUSTGARD,

Notary Public for Alaska.

My Commission expires October 8, 1922.

Filed in the District Court, District of Alaska,  
First Division. May 14, 1920. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [4]

---

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Bill of Particulars.**

Comes now the plaintiff above named and, in response to the Court's order to submit a bill of the particular acts of design or negligence on the part of the defendant which he expects to prove upon the trial submits the following, and he alleges that at the trial of the above-entitled cause he expects to prove the following facts in addition to the facts set up in the complaint, to wit:

## I.

That defendant's flume or conduit, described in the complaint, terminated at a penstock located on the slope described in the complaint and at an elevation of about 300 feet above the premises of plaintiff described in the complaint, from the bottom of which penstock extended a pipe, used and designed to convey and distribute the water to the places wanted by defendant for use, and which pipe will hereafter be referred to as the distribution pipe.

## II.

That on the 2d day of January, 1920, the said penstock overflowed, for the reason that there was more water conveyed through said flume to the said penstock than was carried away from the penstock by the distribution pipe, or otherwise; that the water so overflowing said penstock is the water complained of in plaintiff's complaint and which caused the damage complained of therein. [5]

## III.

That defendant, either negligently or designedly, on the said 2d day of January, 1920, prior to the injury complained of, permitted more water to flow into said flume and to be conveyed by said flume to said penstock than was taken away by the service pipe. That by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the service pipe would, could or

did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises here in question, or otherwise occasioned damage; that ordinary and reasonable care and caution on the part of defendant required of defendant that it should have constructed and maintained at all times such waste flume to carry away such waste water or surplus water, and defendant was negligent in failing to provide such precaution against injury from surplus or overflowing water at or near the penstock; that defendant was negligent in this, that it failed to provide and maintain a series of spillways along its said flume, by which spillways surplus water could and would be released from the flume before it reached the penstock; that the overflow water here in question, and which caused the damage herein complained of, was known to defendant to be so flowing, and likely to cause said damage, long prior to the occurrence of the slide complained of, or would, by the exercise of reasonable care on the part of defendant, have been so known by defendant long prior to the said slide and prior to any damage that would have been done by said water; and the said defendant was negligent in not shutting off said water and preventing the said overflow before any damage was occasioned thereby, and defendant, wrongfully and unlawfully, whether negligent or designedly, permitted said water to continue to flow upon the said premises until after the slide complained of had been caused and the



said damage had been done.

JOHN RUSTGARD,  
Attorney for Plaintiff. [6]

United States of America,  
Territory of Alaska,—ss.

John Rustgard, being first duly sworn, deposes and says: That he is the attorney for plaintiff in the above-entitled cause; that he had made personal investigation of the facts relating to plaintiff's cause of action and is personally as familiar with the facts set up in the foregoing bill of particulars as is plaintiff. That plaintiff is at present absent from the city of Juneau, and for that reason cannot verify personally this bill of particulars. That deponent believes the foregoing bill of particulars to be true, and he makes this verification on behalf of plaintiff, for the reason that plaintiff is absent from the city of Juneau and may not return to the city of Juneau for some considerable time to come and for that reason cannot personally make this verification.

JOHN RUSTGARD.

Subscribed and sworn to before me this 6th day of July, 1920.

[Notarial Seal]      JOHN B. MARSHALL,  
Notary Public for Alaska,  
My Commission expires October 14, 1921.

Service of the foregoing bill of particulars admitted this July 7th, 1920.

HELLENTHAL & HELLENTHAL,  
Attorneys for Defendant.

Filed in the District Court, District of Alaska,  
First Division. July 7, 1920. J. W. Bell, Clerk.  
By————, Deputy. [7]

---

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1949-A

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Answer.**

Comes now the defendant and for answer to the  
complaint of the plaintiff herein admits, denies and  
alleges as follows:

I.

Referring to paragraph I of the plaintiff's com-  
plaint the defendant admits that it now is and at  
all times in the complaint mentioned was a corpora-  
tion organized, existing and doing business as such.

II.

Referring to the allegations of paragraph II of  
the complaint, the defendant avers that it has no  
knowledge sufficient to form a belief upon the ques-  
tion of whether the plaintiff was or is the owner of  
the premises mentioned in said paragraph, and de-  
fendant therefore denies that the plaintiff either  
was at the time stated or now is the owner thereof.

Defendant admits that there was at the time mentioned in the complaint a frame building on the premises described, but it avers that it has no knowledge or information sufficient to form a belief upon the question of whether such frame building was the property of the plaintiff and therefore the defendant denies that such building was the plaintiff's property.

The defendant further avers that it has no knowledge or information sufficient to form a belief as to what the actual or reasonable value of said building was, and therefore denies that it was worth the sum of thirty-eight (\$3800) hundred dollars, or any other sum or sums whatsoever. The defendant avers that it has no knowledge or information sufficient [8] to form a belief upon the question of what articles of property were in said building at the time mentioned or as to whom such articles of property belonged, and defendant therefore denies that there was in said building belonging to the plaintiff, or otherwise, household furniture, or household and kitchen utensils, or a sewing-machine, or a trunk, or fishing gear, or musical instruments, or ornaments, or personal jewelry, or clothing or money or other personal property whatsoever belonging to the plaintiff, and defendant further avers that it has no knowledge sufficient to form a belief upon the question of what was the value of the articles of property mentioned above, and defendant therefore denies that the same were of the actual or reasonable value of

three thousand and twenty (\$3,020) dollars, or of any other sum or sums whatsoever.

### III.

Referring to the allegations of paragraph III of the complaint, the defendant admits that the premises referred to are situated on the westerly slope of a steep and high mountain, generally known as Mount Roberts, at an elevation of approximately 100 feet above the waters of Gastineau Channel, but denies that the grade of said slope at the place indicated in said paragraph is  $40^{\circ}$  from the horizontal, and avers that the grade of said slope at the place indicated is approximately  $30^{\circ}$  from the horizontal. The defendant denies that said slope is covered with a heavy layer of soil consisting principally of gravel, rocks, silt and decayed vegetable matter, but avers in this connection that with the exception of the ravines and gulches and other places where the soil has washed away, the slope of said mountain is covered with a clayey soil mixed with rocks and boulders. Defendant denies that the soil on said mountain was or is so composed, or so situated, that in case it became or becomes heavily saturated with water, or in case water in addition to the natural rainfall, were or should be deposited upon the surface thereof, it would slide downhill, either so as to destroy the buildings referred to and the articles of property therein contained or otherwise, and in [9] this connection the defendant avers that the soil on said mountain-side was at rest at the natural angle of repose in a



position occupied by it for a long period of time and that saturation however caused would not cause it to slide unless the angle of repose had been first changed by the making of excavations or otherwise, and in this connection defendant further avers that neither it nor its officers nor agents, ever had any knowledge to the effect that said soil deposits would slide if the same became saturated, but, on the contrary, knew the facts to be as hereinbefore stated.

#### IV.

Referring to the allegations of paragraph IV, the defendant admits that it diverted and applied to use for its own benefit and for its own purposes a portion of the waters of Gold Creek, but avers that said appropriation was not made in 1914 or 1915, but in the year 1910. The defendant admits that the waters so diverted were conducted by means of a flume line consisting in part of wooden flume and in part of a conduit through a series of tunnels in Mount Roberts, and that in conducting said waters through said flume and ditch line, the same passed over and above the premises described therein as the premises of the plaintiff, at an elevation of some four hundred feet above the waters of Gastineau Channel and at an elevation of about three hundred feet above the premises so designated as plaintiff's premises. In this connection the defendant avers that the facts in relation to the said appropriation of water and its application to use by

the defendant are more specifically set forth elsewhere in this answer.

V.

Referring to the allegations of paragraph V of the plaintiff's complaint, the defendant denies that the water so diverted by it, or any other water in its possession or under its control, did on the 2d day of January, 1920, or at any other time, while the plaintiff was the owner or occupant or in the possession of the premises referred to, or any other time, either because of design on the part of the defendant or because [10] of its negligence, or at all, escaped from or flowed from said flume or conduit, and defendant denies that such water or any other water was, by its negligence, or by its acts whether negligent or otherwise, caused or permitted to be unlawfully or otherwise deposited upon or to flow over or on to the slope of Mount Roberts, or upon the plaintiff's premises, or the premises described as the plaintiff's premises, or any other place or places whatsoever, and defendant denies that through or by the negligent or wilful acts or any other acts of the defendant whatsoever, said waters so diverted from Gold Creek, or any other water or waters under its control, flowed upon said slope below said flume or elsewhere, and defendant denies that such waters saturated the soil upon said slope either above or underneath the buildings referred to, and either in that manner or any other manner owing to the negligent and unlawful acts of the defend-

ant, or any other act or acts of the defendant whatsoever, causing the said soil situated on said slope or premises to slide down hill in the direction of Gastineau Channel or at all. The defendant denies that in the manner mentioned the premises referred to as belonging to the plaintiff were completely demolished and destroyed, or demolished and destroyed at all. Defendant denies that said frame building described as belonging to the plaintiff and the other property mentioned in said paragraph as being within said building were in the manner mentioned, or at all, demolished or destroyed; denies that the same were rendered absolutely worthless, or in any degree rendered worthless. In this connection the defendant avers that a landslide occurred on the slope of Mount Roberts at the time mentioned, as is hereinafter more specifically set forth, but defendant denies that it was caused either directly or indirectly by any negligent or other act of this defendant, and defendant avers in this connection that no water flowed from its penstock, flume line, or ditch line, or from any other device or devices in its possession, or under its control prior to the time that said land slide took place, and in this connection avers that the facts in relation to said land slide, as well as other matters and things therein [11] referred to, are more specifically set forth elsewhere in this answer.

## VI.

Referring to the allegations of paragraph VI of

the plaintiff's complaint, the defendant denies that by reason of the facts set forth and that by reason of any negligence or unlawful acts of the defendant, or by reason of any act or acts on the part of the defendant whatsoever, the plaintiff was damaged in the sum of six thousand eight hundred and twenty (\$6,820) dollars, or in any other sum or sums whatsoever.

Referring to the bill of particulars filed herein, and for answer to the matters and things therein alleged, the defendant admits, denies and alleges as follows:

I.

Referring to paragraph I of said bill of particulars the defendant admits that its flume terminated at a penstock located on the slope of Mount Roberts, which was situated at about the elevation referred to in the bill of particulars, but denies that the water coming to said penstock was distributed by a single pipe, and avers, on the contrary, that three pipes led from said penstock to three different places of use. One of these pipes was owned and controlled solely by the City of Juneau, a municipal corporation, and maintained by it in connection with its water system used for the purpose of extinguishing fires. Another pipe was connected with the power plant of the defendant so as to supply water for use in connection with its operation, and a third pipe was connected with the mill of the defendant to supply water for use in connection with the operations there carried on.



## II.

Referring to paragraph II of said bill of particulars, the defendant denies that on January 2d, 1920, or at any other time or times, the said penstock overflowed, either for the reason that there was more water conveyed through the flume to the said penstock than was carried away from the penstock by the distribution pipe or pipes or otherwise, or for any other reason or reasons whatsoever. And the defendant further [12] denies that any water overflowing from said penstock at the time mentioned, or at any other time, was the cause of any damage complained of in the complaint, or any other damage whatsoever.

## III.

Referring to paragraph III of the said bill of particulars, the defendant denies that it either negligently or designedly, or at all, on the 2d day of January, 1920, prior to the injury complained of, or at any other time or times, permitted more water to flow into its flume and to be conveyed by its said flume to its said penstock, than was taken away by the service pipe or pipes.

The defendant denies that the construction or maintenance of a flume or conduit to confine or carry away to some safe place, or otherwise, any water which, at any time for any reason, might be conveyed to the penstock in excess than what the service pipe would, could, or did carry, could serve any purpose in carrying away water that could, or would, at any time, overflow because of being carried to the penstock. And defendant denies that ordi-

nary or reasonable care or caution, or any other degree of care or caution on the part of the defendant, required it to construct or maintain at any time, such waste flume, or any flume, to carry away such waste water or surplus water, or any other water whatsoever; and defendant denies that it was negligent in failing to provide such precaution, or any other precaution, against injury from surplus or overflowing water, or any other kind of water, at or near its penstock or elsewhere, and in this connection the defendant avers that its penstock, flume and distribution pipes were installed in accordance with the best engineering practice, and were so installed that no person could anticipate any overflow of water, either from the flume or penstock, at the point mentioned, or elsewhere, and would have no reason to expect such overflow to occur.

The defendant denies that it had any knowledge at any time of any overflow water which caused the damage referred to in the plaintiff's complaint; denies that any water did overflow and cause such damage, [13] or any other damage whatsoever; denies that there was any reason for the defendant to suspect that any water would so overflow; denies that it had any such knowledge, either long prior to the occurrence of the slide referred to, or at any other time, or at all. Denies that, by the exercise of reasonable care, or any other degree of care, it would, or could have known that water was overflowing at the point referred to in said bill of particulars, or elsewhere, and denies that any water

was so overflowing; denies that the defendant was negligent in not shutting off said water, or any other water under its control; denies that the defendant was negligent in not preventing said overflow, or any other overflow, before damage was occasioned, or otherwise; denies that the defendant unlawfully, wrongfully, or at all, negligently, designedly or at all, permitted said water to continue to flow upon said premises until after the slide complained of had been caused, or at all, and until after said damage had been done, or at all, and in this connection the defendant avers that no water whatsoever overflowed from its said penstock, or flume, or any other contrivance under its control prior to the time that the slide on the side of Mount Roberts referred to in the complaint, took place; and denies that said slide was caused either in whole or in part by any water or waters coming from the defendant's penstock or flume, either as alleged in said complaint and bill of particulars, or otherwise.

And the defendant further answering AVERS:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, authorized to do and doing business in the Territory of Alaska, at and near Juneau; that the defendant has fully complied with the laws of the Territory of Alaska as to the domestication of foreign corporations, and has paid the annual license *tas* due the Territory of Alaska, January 1st, 1921.

## II.

That it is engaged in the business of operating a mine situate some distance behind the town of Juneau in the Silver Bow Basin, and generally known as the Alaska Juneau Mine. That it operates a milling [14] plant, for the reduction of the ores mined at its said mine, on the slope of Mount Roberts along the shore of Gastineau Channel. That in connection with the operation of its said milling plant, it has diverted some of the waters of Gold Creek and has conduits extending along the side of Mount Roberts and through a series of tunnels driven along the course of said flume. That, at a point above the premises referred to in the complaint and described as the premises of plaintiff, the waters carried by the flume are discharged into a penstock from which the same are distributed by means of distribution pipes to the places of use. One pipe, which belongs to and is maintained by the City of Juneau, leads to the water-mains of the City of Juneau so as to make the water available for fire fighting purposes, another pipe leads to the power plant of the defendant where such portion of the waters as carried by said pipe are applied to use in the generation of electric power. The third pipe is of large dimension and taps said penstock above the other two, and conveys all the water coming to said penstock not flowing through the other two pipes to defendant's milling plant where the same is applied to use. That said appliances are so constructed that said penstock cannot overflow, and said flume and penstock, distribution pipes, and all



other contrivances used in connection with modern engineering, and the same were, each and all, installed and maintained with the highest degree of care and engineering skill.

That, in order to prevent leaves, moss and other kinds of debris, from entering the distribution pipes, and occasioning interference or inconvenience in connection with the operation of machines fed by such pipes, either directly or indirectly, it was necessary and imperative that a screen should be so installed as to take from the water coming into said penstock, the moss, leaves and other debris, and for that purpose a revolving screen was placed at the opening of said flume in such a manner that the water coming therefrom would flow through said revolving screen and the moss, leaves and other debris would be separated therefrom and carried by said screen through a spout installed for said purpose, to the outside of the penstock above [15] referred to. That the waters of Gold Creek are generally quite clear but do, on occasions, for one reason or another, contain moss, leaves and debris in sufficient quantity that the meshes of a stationary screen might become clogged and that, in order to overcome this difficulty, the revolving screen as aforesaid was installed, which was at all times kept revolving in such a manner as to keep itself clean from moss, leaves and other forms of debris, and permit the free and unobstructed passage of the water through it. That in order to accomplish this purpose, an electric motor was installed, which was supplied and driven with, and by, a current coming

from the electrical system maintained by the defendant. That said motor would continue to keep said screen revolving, and, in that manner, to keep the meshes thereof from becoming clogged so as to allow the water to pass through the same freely, and that all the devices so installed were of the most approved type, and in all respects, sufficient for the purposes for which the same were designed, and were installed and maintained in accordance with the highest degree of care, foresight and engineering skill.

### III.

That on January 2d, 1920, a slide occurred on the slope referred to in the complaint.

### IV.

That the Alaska Gastineau Gold Mining Company maintained a tower on the area that formed part of the general mass that slid down the mountain side on the occasion referred to, and that high tension wires, owned and controlled by the last-mentioned corporation, were fastened to said tower, it forming a part of its general pole line on which wires were stretched to convey electric current. That the wires so designed to carry electric current, and owned and controlled by the said Alaska Gastineau Gold Mining Company, were in close proximity to a line of poles supplied with similar wires designed for like uses, and owned and controlled by the [16] defendant company and others associated with it in that regard, and, at a point immediately to the south-east of where said landslide occurred, the wires of said Gastineau Company crossed the wires of the

defendant and its said associates. That when said landslide took place, the said tower of the said Gastineau Company situated on the slide mass, as above stated, was disturbed with a result that the wires of the said Gastineau Company and those of the defendant and its associates, were brought in close enough contact to cause a short circuit on the defendant's plant, including the motor designed and installed to drive the revolving screen above referred to, were stopped so that said revolving screen came to a standstill as a result of the slide aforesaid.

#### V.

That a short time prior thereto, another and different landslide occurred on the northerly slope of Mount Roberts in the vicinity of Wood's Gulch, which said landslide came from a point high up on the slope of said mountain, and was such that it could not be anticipated or foreseen, and consisted of a quantity of *quantity of* gravel and soil that slid down the side of the mountain, and in coming in contact with the flume and *and* diverting works of the defendant situate at Wood's Gulch, so damaged the same and interfered with their operation, that a considerable quantity of surface water carrying moss, leaves and other forms of debris coming from the side of Mount Roberts at that point, found its way into the North Portal of what is known as No. 3 Tunnel, and thence into the flume of the defendant hereinbefore referred to. That said landslide occurred just immediately prior to the landslide referred to in the complaint, and that steps were immediately taken by the defendant to over-

come the effect thereof, but that some of the debris consisting of leaves, moss and other loose materials lying on the surface of the mountain, had, notwithstanding the highest degree of vigilance exercised by the defendant, found its way into the flume as aforesaid, and that, by reason thereof and because of the unusual rains that had fallen immediately prior to the time of the slide referred to, the water coming from the flume and passing through said revolving screen, was highly charged with leaves, moss and other surface debris so that when [17] the revolving screen came to a stop, as hereinbefore stated, the meshes thereof were quickly filled with debris so as to cause the waters coming from the flume to, in part, flow over said screen instead of through the same, and find their way through the discharge spout installed and designed for the purpose of enabling the trommel screen to discharge the moss and debris taken from the water, to the outside of the penstock, as hereinbefore stated. That said water did not come from said spout designed to carry away the debris taken from the water by the screen, until after the screen had stopped and the meshes thereof had become clogged as above stated, all of which was due directly to the movement of the slide mass and the consequent interference with the electrical current supplying the motor by which said revolving screen was driven, which said slide was an act of God over which the defendant had no control, and which the defendant could not, by the exercise of any degree of foresight, have anticipated or foreseen.



That the waters so coming from said appliances of the defendant, did not, in any wise, occasion said slide, were not the cause thereof, either in whole or in part, and were not due to any negligence of the defendant, but occasioned as aforesaid, by causes beyond its control, and which were such that it could not foresee their occurrence.

And the defendant further answering, and by way of affirmative defense, AVERS:

I.

That the deposits of earth on the side of Mount Roberts at, and in the vicinity where the slide herein referred to occurred, were, and had been, for many years, in a state of rest and were so situated that, unless disturbed or undermined, the same would remain in the position occupied by them on the mountain side, in the absence of unusual, natural occurrences.

II.

That on the second day of January, 1920, and for a long time prior thereto, one Peter Koski, and his predecessors in interest, occupied a plot of ground on the slope of Mount Roberts immediately above the premises referred to in the complaint as the premises occupied by the plaintiff; that [18] the said Koski and his said predecessors in interest, as well as his and their agents, servants and employees, made an excavation on the premises occupied by them and cut away a portion of the soil situate on the slope of Mount Roberts at that point in such a manner as to deprive the soil mass lying above said excavation and cut of its adjacent support so as to

enable it to slide down the mountain side and that the soil mass lying immediately above said cut and excavation so made and maintained was the mass that slid and formed the land slide referred to in the complaint.

That the said Peter Koski and his predecessors before him failed to place any bulkhead or bulkheads, or any protection whatsoever in said cut or excavation at the point where the natural slope of the hill had been so changed, or at all, but on the contrary, negligently made such excavation so as to remove the subjacent support from the mass lying above the same, and negligently failed to construct bulkheads or other structures with a view of supporting the mass from which the subjacent support had been so taken; and that the said Koski at all times in these pleadings mentioned, so negligently maintained said excavation, and so negligently failed to take any steps whatsoever to protect himself from landslides, or to support said mass by means of a bulkhead or otherwise, or in any wise to supply any kind of device or devices whatsoever that would prevent said mass from sliding, and negligently failed to take any steps to retard or oppose the action of natural laws in establishing the equilibrium of the soil mass on the mountain side disturbed by the making of such cut or excavation.

That on the said 2d day of January, 1920, said mass having become saturated with water, which said saturation resulted solely and entirely from natural causes, to wit, unusually heavy rains and melting snows, was absorbed by said mass until it

*becamse* saturated and heavy, and it, having no support, its subjacent support having been taken away and removed by the said Koski and others connected with him as aforesaid, and no effort having been made to supply support by artificial means, thereupon slid down the mountain side, the mass so sliding being coextensive with the excavation made as aforesaid. That the making and the maintaining of said excavation, and the removal and consequent absence of the subjacent support that the [19] hillside mass formerly had in its natural state, as well as the negligence of said Koski in failing to construct a bulkhead or other similar devices as aforesaid, were the sole cause of the slide above mentioned and referred to in the complaint.

WHEREFORE, the defendant prays that this plaintiff's complaint be dismissed, and that the plaintiff receive nothing by reason thereof, and that the defendant have judgment against the plaintiff for its costs and disbursements in its behalf incurred.

HELLENTHAL & HELLENTHAL,  
Attorneys for Defendant.

United States of America,  
Territory of Alaska,—ss.

P. R. Bradley, being first duly sworn, on oath deposes and says: That he is the agent and general manager of the defendant corporation; that he has read the foregoing answer and knows the

contents thereof and that the facts therein stated are true as he verily believes.

P. R. BRADLEY,

Subscribed and sworn to before me this 18th day of March, 1921.

[Notarial Seal]      SIMON HELLENTHAL,  
Notary Public for Alaska.

My Commission expires Dec. 15, 1921.

Copy received and service admitted March 18th, 1921.

HENRY RODEN,  
Of Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. Mar. 18, 1921. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [20]

---

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Reply.**

Comes now the plaintiff and for reply to defendant's answer herein denies and alleges as follows, to wit:



## I.

Replying to defendant's "further answer" plaintiff denies that the appliances mentioned in Paragraph II thereof are so constructed that the penstock cannot overflow, denies that the appliances in said paragraph mentioned were installed and maintained with the highest degree of care and engineering skill, but alleges the fact to be that said penstock, screen and appliances were installed and maintained in a careless and negligent manner as set forth in the complaint filed herein.

Denies each and every material allegation, matter and thing contained in paragraph IV of said "further answer" and the whole thereof.

Denies each and every material allegation, matter and thing contained in paragraph V of said "further answer," and especially denies that a slide occurred at Wood's Gulch as in said paragraph alleged and especially denies that the slide complained of was caused by an act of God, and in that connection plaintiff alleges that the slide complained of and the damage to plaintiff as in the complaint alleged and set forth was caused by the negligence of the defendant as in said complaint alleged and was caused solely by the water escaping from defendant's appliances.

## II.

Replying to defendant's further answer "by way of affirmative [21] defense" plaintiff denies that Peter Koski, deceased, and his predecessors in interest, or Peter Koski or his predecessors, or any other person, or at all, made any excavation

in or cut away any portion of the soil situate on the slope of Mount Roberts at a point mentioned and described in paragraph II of said affirmative defense, or at any other point or at all; denies that said Peter Koski, deceased, or any other person, did any act or thing whatsoever which deprived any soil mass of its support and denies that the soil mass that slid and formed the slide in said paragraph referred to was situate immediately above the premises in said paragraph described; but alleges the fact to be that the mass which slid came from a point somewhat higher on the mountain side than the premises occupied by Peter Koski, deceased, or his predecessors in interest.

Plaintiff denies that unusually heavy rains caused the mass of earth in said paragraph described to become saturated with water and that such saturation resulted from natural causes, but alleges the fact to be that such saturation was caused solely and exclusively by a large volume of water poured upon said mass and discharged from the penstock of defendant, as alleged in plaintiff's complaint, and bill of particulars; denies that said mass slid down on account of any act done or left undone by said Peter Koski, or his predecessors in interest or by any other person, except by the negligent act of defendant in maintaining its flume and penstock as set forth in plaintiff's complaint, and bill of particulars; denies that the failure of said Koski or the failure of any other person to construct a bulkhead was the sole

cause or any cause of the slide referred to, and denies that the said Koski or any other person was negligent in any way or manner whatsoever, and alleges that no act, either of commission or omission, on the part of the said Koski or on the part of any other person, in any way, manner or form caused the said slide or contributed to the cause thereof.

Further answering the said affirmative defense plaintiff denies that the slide or damage complained of was caused by any negligent act of the said Koski or of his predecessors or any other person, or by the combination of all or any of the acts or occurrences mentioned in paragraph II of said [22] affirmative defense; denies that any of the acts, conditions and circumstances referred to in said paragraph caused, severally or collectively, or severally or collectively, the said slide or damage complained of, and denies that any of the acts, conditions or circumstances referred to in said paragraph II contributed in any manner whatsoever severally or collectively, or severally or collectively, to cause said slide or damage complained of, and plaintiff alleges that the said slide and damage by him complained of was caused as set forth in his complaint filed and bill of particulars; herein and in no other manner.

WHEREFORE, plaintiff prays judgment as in his complaint.

RODEN & DAWES,  
Attorneys for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

John Larson, being first duly sworn, on his oath deposes and says: I am the plaintiff in the above-entitled action; I have read the foregoing reply, know the contents thereof and the same is true as I verily believe.

JOHN LARSON.

Subscribed and sworn to before me this 21st day of April, 1921.

[Notarial Seal]

HENRY RODEN,

Notary Public, Territory of Alaska.

My commission expires July 24, 1922.

Copy received and service admitted this 21st day of April, 1921.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

Filed in the District Court, District of Alaska,  
First Division. Apr. 22, 1921. J. W. Bell, Clerk.  
By ———, Deputy. [23]

---

Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy.

Filed and presented this July 13, 21.

ROBERT W. JENNINGS,

Judge.



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

In the Matter of JOHN LARSON

vs.

ALASKA JUNEAU GOLD MINING COMPANY.

**Bill of Exceptions.**

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable Robert W. Jennings, Judge of the above-entitled court on the 20th day of April, 1921; that both parties were present and duly represented by counsel, Henry Roden acting as counsel for the plaintiff, and Hellenthal & Hellenthal as counsel for the defendant, whereupon a jury was duly selected, impanelled and sworn, and the cause duly proceeded to trial before the Court and jury so selected; thereafter both plaintiff and defendant called witnesses, and evidence was regularly adduced, which said evidence so adduced was sufficient to sustain the verdict of the jury upon all matters submitted to them other than the question of the extent of the injuries sustained, and the amount of the damage sustained, by reason of the matters and things referred to in the complaint; that the plaintiff called as a witness JOHN LARSON, who, being duly sworn, on oath testified in answer to questions as follows:

**Testimony of John Larson, for Plaintiff.**

Direct Examination.

(By Mr. RODEN.)

Q. What is your name?      A. John Larson.

Q. Where do you live, John?

A. I live in Juneau. [24]

Q. How long have you lived in Juneau?

A. About 9 years.

Q. Are you the man that brought this lawsuit we are trying now?      A. Yes.

Q. What has been your business since you have been in Juneau?      A. Common laborer.

Q. Where do you live?

A. I live on Gastineau Avenue.

Q. You did live there—on what lot did you live there?      A. No. 2.

Q. Do you know what block it is in?

A. Small n.

Q. Block n. How long have you lived there, John?

A. I have lived there since the spring of 1913.

Q. Did you buy that lot?      A. Yes.

Q. From whom?      A. From John Lund.

Mr. RODEN.—Will it be all right, Mr. Hellen-thal, if I do not prove the trustee's title?

Mr. HELLENTHAL.—I don't care about the trustee's title. The only thing I want Mr. Larson to show is the title from John Lund to himself.

Q. You bought it from John Lund?      A. Yes.

(Testimony of John Larson.)

Q. Did you buy that property yourself, or did somebody else buy it?

Mr. HELLENTHAL.—Of course I will object to the testimony as not the best evidence, unless it is preliminary.

Mr. RODEN.—It is merely preliminary.

Mr. HELLENTHAL.—Then I have no objection to it. [25]

A. I bought it myself.

Q. In whose name was the deed taken?

A. It was in my wife's name.

Q. What was your wife's name?

A. Mary Larson.

Q. Your wife is dead, isn't she?

A. She is dead.

Q. When did she die?      A. She died in 1918.

Mr. RODEN.—Now, may it please the Court, we desire to introduce in evidence a deed from John Lund to Mary Larson. I might state to the Court that I discovered a day or two ago that the record title stands, not in the plaintiff, but the record title stands in the name of Mary Larson, now deceased, so I take it that all that Mr. Larson can recover for would be for his life estate—estate by curtesy—as far as the real property is concerned, anyhow. I did not know this. Of course, as the Court knows, I did not commence this suit—I did not know until I began to question Mr. Larson recently when I was preparing to prove his title.

Mr. HELLENTHAL.—I will not object to that

(Testimony of John Larson.)

deed if it is part of the chain of title—if it is part of the chain of title from Mr. Lund to the plaintiff I have no objection to the deed.

Mr. RODEN.—This is the only title, as far as Mr. Larson is concerned. I want to ask him a few preliminary questions first about it.

Q. Who was Mary Larson?

A. She was my wife.

Q. When were you married, Mr. Larson?

A. I was married in the spring of 1912. [26]

Q. Where?      A. Here in Juneau.

Q. Before whom?      A. I didn't hear.

Q. Where were you married—in the courthouse before the Judge, or in the church?

A. No, in the church.

Q. Do you remember who the minister was?

A. Yes, it was a Swedish minister.

Q. What was his name?      A. His name was—

Q. Have you got the marriage certificate, John?

A. Yes, I had it.

Q. Where is it now?      A. I lost it in the slide.

Q. When did your wife die?

A. She died in 1918, in the fall.

Q. Any children?      A. Yes.

Q. How many?      A. One.

Q. One child. Did your wife leave a will? Do you know what I mean by a will?      A. No.

Q. What I mean is, did your wife leave a paper in which she said what should become of the property in case she died before you died or before the child died?



(Testimony of John Larson.)

A. I didn't have no chance to see her—she was sick.

Q. Where did she die?

A. She died in the hospital.

Q. Where—here?     A. Yes. [27]

Q. Where were you at the time?

A. I was at home.

Q. That is, in your house here?     A. Yes.

Q. That is, you mean you were not just present at the moment your wife died?     A. Yes.

Q. But you and your wife had lived together up to the time that she was taken to the hospital.

A. Yes.

Q. Lived together as husband and wife?

A. Yes.

Q. No trouble of any kind?     A. No.

Q. Have you ever found any paper in which your wife said what should become of any property that she had, in case she died?     A. No.

Q. Not that you know of?     A. No.

Mr. RODEN.—Now, if the Court please, we desire to introduce in evidence a deed from John Lund to Mary Larson, the wife of this plaintiff.

Mr. HELLENTHAL.—The deed is immaterial unless it is part of the chain of title.

The COURT.—It must be part of the chain of title—to show his interest—his ownership, in some way or other, is it not?

Mr. RODEN.—I take it that the only way I can show it, this puts the title in his wife, and his wife died.

The COURT.—He has other title that came from his wife? [28]

Mr. RODEN.—Yes, sir.

The COURT.—Very well—that is a part of the foundation of your suit—of your right.

Whereupon said deed was received in evidence, marked Plaintiff's Exhibit "N," and is in words and figures as follows, to wit:

**Plaintiff's Exhibit "N."**

"THIS INDENTURE, made this 14th day of April, in the year of our Lord One thousand nine hundred and thirteen (1913) BETWEEN John Lund and Carolina Lund, wife of said John Lund, both of Juneau, Alaska, parties of the first part, and Mrs. Mary Larson, of the same place, party of the second part:

WITNESSETH, That the said parties of the first part for and in consideration of the sum of Twelve Hundred and no/100 Dollars Lawful Money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to her heirs and assigns, the following described tract, lot or parcel of land, situate, lying and being in the City of Juneau, Alaska, particularly bounded and described as follows, to wit:

ALL of Lot numbered two (2) in Fractional Block 'n' (little n), according to the official plat of said City of Juneau, Alaska, made by G. W. Gar-

side, U. S. Surveyor, and approved by the Trustee of the townsite of said Juneau, Alaska.

TOGETHER with the appurtenances, to have and to hold the said premises, with the appurtenances, unto said party of the second part and to her heirs and assigns forever.

And the said parties of the first part, their *heirs*, executors and administrators, do by these presents, covenant, grant and agree to and with the said party of the second part, *heir* heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, her heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will WARRANT and forever DEFEND.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals [29] the day and year first above written.

JOHN LUND.

CAROLINA LUND.

Signed, sealed and delivered, in the presence of

ED. C. RUSSELL.

EARLE C. JAMESON.

United States of America,

District of Alaska,—ss.

THIS IS TO CERTIFY, that on this 14th day of April A. D. 1913, before me, the undersigned, a

Notary Public in and for the District of Alaska, duly commissioned and sworn, personally came John Lund and Carolina Lund to me known to be the individuals described in and who executed the within instrument, and each acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

And the said Carolina Lund, wife of said John Lund upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known unto her, and she was by me fully appraised of her rights and the effect of signing the within instrument, did freely voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did, voluntarily of her own free will and without the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

[Notary Seal]                      JOHN G. HEID,  
Notary Public in and for Alaska, Residing at  
Juneau, Alaska.

Filed for record at 2 o'clock P. M., May 19, 1913,  
in Book 24 of deeds, page 19.

G. C. WINN,  
District Recorder. [30]



(Testimony of John Larson.)

Q. How old a man are you, Mr. Larson?

A. 38.

Q. How long have you been in the United States?

A. 19 or 20 years.

Q. Are you an American citizen? A. Yes.

Q. How is your health? A. Oh, pretty good.

Q. Have you ever suffered from any serious disease or ailment? A. No.

Q. Where were you on the 2d day of January, 1920, John? A. I was in my house.

The COURT.—Just a moment before you go any further. Do you propose to establish title to any greater extent than you have already done?

Mr. RODEN.—Not in the real estate, your Honor, I cannot.

The COURT.—What are you suing for—loss of the real estate, and what else?

Mr. RODEN.—And the personal property in the house, and cash money—the personal property of this defendant.

The COURT.—All right.

Q. That is, you were in the house that you have just mentioned? A. Yes, sir.

Q. That was on lot 2, block n, was it?

A. Yes.

Q. What kind of a house did you have there?

A. I had three stories—four floors.

Mr. HELLENTHALL.—We object to that testimony if it is to prove this man's ownership of the house, as not the best [31] evidence.

The COURT.—Of course that does not prove

(Testimony of John Larson.)

ownership—he just asked him what kind of a house he had there.

Mr. HELLENTHAL.—He said, “What kind of a house did you have there?” It is all right for him to testify what kind of a house was on the lot.

The COURT.—What was your question?

Mr. RODEN.—I asked him what kind of a house he had there. Of course under the allegations of the complaint as it is, he has a right to show his life estate—his right by curtesy. That is the only thing I can see Mr. Rustgard could have thought about when he commenced the suit without having an administrator appointed for Mrs. Larson. I cannot see any other theory.

The COURT.—Are you trying this case on what Mr. Rustgard thought?

Mr. RODEN.—I have to try the case the way I find it, your Honor,—I didn't know anything about this title.

The COURT.—We can obviate that question. Ask him what kind of a house there was on the property, and then I can pass on the whole thing after awhile.

Mr. RODEN.—I think that would be immaterial, until the title to the property itself is established. The house would be appertenant to the lot.

The COURT.—I do not know whether it would or not.

Mr. HELLENTHAL.—Of course there might be conditions under which it would not.

(Testimony of John Larson.)

The COURT.—He may answer that question, what kind of a house was on the lot.

Q. (By Mr. RODEN.) Describe that house, John, when you first went on to this property.

[32]

A. It was only a five-room house.

Q. How big was the house?

A. It was—you mean *now* long and how wide?

Q. Yes.

A. It was about 39 feet long and 24 feet wide.

Q. Was it more than one-story high?

A. At first it was just one story.

Q. Just one story high?     A. One story.

Q. What did you pay for that property?

A. First I paid \$1200.

Mr. HELLENTHAL.—It is immaterial what he paid for it, if it wasn't his property.

The COURT.—It is immaterial anyhow—the question is, what was the value of it?

Mr. RODEN.—Sure. Then what did you do, if anything, in the way of improving this house?

A. I want to rebuild there.

Q. Just tell the Court and jury what you did do in the way of rebuilding the house.

A. I went and I raised it up two or three feet, then I put a new foundation, then I put another story on top of it, and then I put three rooms in the basement there.

Q. That practically became, then, a three-story house, did it?     A. Three stories; yes.

(Testimony of John Larson.)

Q. How much money did you pay for having these changes made?

Mr. HELLENTHAL.—We object to that as immaterial.

The COURT.—Objection sustained.

Q. Who paid for doing this work?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Objection sustained. [33]

Q. Who paid for doing this work?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Objection is sustained.

Q. What was in the house, John, in the way of furniture?      A. Furniture was in there.

Q. Have you got a list of the stuff you had in there?      A. Yes.

Q. All right, you may use that list and tell us what was in there.

A. One range stove, hot water connection, \$70.00.

The COURT.—If he has a list of it, just submit the list.

Q. Have you a list there?      A. Yes.

Q. Is that a true statement, what you have got there, of what was in the house?      A. Yes.

Q. On the day of the slide?      A. Yes.

Q. Who did that property belong to that was in the house there?

Mr. HELLENTHAL.—That is the personal property?

Mr. RODEN.—The personal property, yes,—who



(Testimony of John Larson.)

did that belong to?     A. It belongs to me.

Mr. RODEN.—It belonged to you. All right. We desire to introduce in evidence this list of personal property that was upon the premises.

The COURT.—It is attached to the complaint?

Mr. RODEN.—No, your Honor, but I understand counsel asked for a bill of particulars and that is the bill of particulars. [34]

Mr. HELLENTHAL.—It goes in evidence only to the extent of being an enumeration of the property. The list also contains the valuation of each article—we do not object to that, of course.

The COURT.—Fix the valuation so the whole thing may go in, Mr. Roden.

Mr. RODEN.—What is the total value of the property, do you know, John?

A. I cannot say.

Q. That is the total there, I guess.

A. \$3031.00.

Whereupon said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O," and is in form and figures as follows, to wit:

**Plaintiff's Exhibit "O."**

"In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

**BILL OF PARTICULARS.**

COMES NOW the plaintiff above named and, in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following: [35]

**BILL OF PARTICULARS.**

1 range, hot-water connections .....	\$70.00
1 range .....	60.00
3 heaters .....	31.00
3 full size bedsteads and bedding .....	210.00
7 three-quarter size bedsteads and bedding .....	420.00
5 dressers or bureaus .....	75.00
1 dresser or bureau .....	20.00
4 center tables .....	16.00
1 kitchen table .....	10.00

5 kitchen chairs .....	13.50
19 chairs .....	57.00
1 rocking chair .....	7.00
1 rocking chair .....	10.00
1 couch .....	16.00
1 couch .....	14.00
Cooking utensils .....	15.00
Plated dishes, etc. ....	25.00
1 doz. silver plated teaspoons .....	6.00
1½ doz. tablespoons, silverplated .....	6.00
1½ doz. each of knives and folks, silver- plated .....	10.00
1 wool carpet .....	50.00
1 sewing-machine .....	50.00
1 wool and cotton carpet .....	30.00
1 trunk .....	20.00
Fishing gear, including 2 herring nets ..	45.00
Set of carpenter tools .....	10.00
2 kitchen sinks with fittings .....	18.00
1 porcelain toilet, complete fitted .....	25.00
pipes and fittings .....	75.00
1 Howard watch, 14 carat gold case ....	90.00
1 double nugget chain for watch .....	52.00
1 ladies gold watch, Waltham, 17 jewel ..	60.00
1 ladies watch chain .....	35.00
1 ladies short nugget chain .....	15.00
1 wedding ring .....	10.00
1 man's buckle ring .....	15.00
1 boy's gold ring .....	5.00
2 nugget pins .....	6.00

(Testimony of John Larson.)

1 ladies nugget brooch pin .....	8.50
Full brass band musical instruments...	750.00
Miscellaneous house furnishings, pictures, decorations, personal toilet articles, trinkets, etc. ....	100.00
Cash .....	220.00
Personal clothes for self and child ....	250.00

---

Total .....\$3031.00

(Signed) JOHN RUSTGARD,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

John Larson, being first duly sworn, [36] deposes and says: That he is the plaintiff above named; that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

JOHN LARSON.

Subscribed and sworn to before me this — day of June, 1920.

---

Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this — day of June, 1920.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.”

Q. Now what did you do the morning of the second of January, 1920, after you got up?



(Testimony of John Larson.)

A. I went up to Koski's place.

Q. Went up to Koski's place. As I understand it, your house was located just below Koski's house?

A. Yes.

Q. About what time did you go up to Koski's place?

A. That was about twenty minutes after nine.

Q. What did you go up there for?

A. I went for my breakfast; I was boarding over there.

Q. How did you go over to the Koski house from your place? A. I walked over.

Q. Which way did you go into the Koski house?

A. I went in from the front.

Q. You went in from the front. All right. You had your breakfast in there? A. Yes.

Q. How long did you stay in there? [37]

A. I stayed about half an hour or so.

Q. Then what did you do?

A. I went out again, and I went back to my own house there.

Q. Did you see any water anywhere at that time? A. Yes, I saw a little.

Q. Where was the water?

A. It was coming over the bank.

Q. Which bank?

A. That was back of Koski's house.

Q. Where were you when you saw this water?

A. I was coming out from the kitchen door, and I went back to my own house.

(Testimony of John Larson.)

Q. The kitchen door was at the back end of the house then?      A. The back end; yes.

Q. All right. Where was this water coming from that you saw coming down there?

A. Coming from up the hill.

Q. Could you see up the hill, the place where it was coming from?

A. I could see a little ways; yes.

Q. About how far up the hill did you see it?

A. Oh, about 50 feet or so.

Q. About how much water did you see there,—can you give us an idea about how wide a stream—how thick—deep?

A. Might be 2 or 3 feet wide.

Q. Now where was it coming with reference to the Koski house,—was it on the side, or the center, or where?      A. Right in the center.

Q. And that was about what time in the morning?      A. That was about ten minutes to ten.

Q. Then what did you do? [38]

A. I went back to my own house.

Q. How long did you stay in your house before anything happened?

A. I stayed about over an hour.

Q. Stayed about an hour. Then what happened?

A. Then the slide came.

Q. Describe a little bit more in detail as to how it came.

A. Well, I was upstairs and I came down from upstairs, and I came on the second story, and then

(Testimony of John Larson.)

I go in through the door and I shut the door, and then the house went, and I went with it.

Q. What was it that came down. You say the slide came—tell us what it was.

A. Koski's house came right on top of mine.

Q. Did anything else come on top?

A. The steel tower.

Q. The steel tower—did the steel tower come on your house, too?

A. The steel tower was right by Koski's place there.

Q. Did you see the steel tower on Koski's place?

A. No I didn't.

Q. Was there any water anywhere?

A. I didn't see any water that time.

Q. What did you see?

A. I didn't see any—I was inside the house there.

Q. You were inside of the house? A. Yes.

Q. So you didn't have a chance to see it—to look through the window.

A. No, I didn't.

Q. What was the next thing you remember then—what happened to you first? [39]

A. Then after, I went down about 50 feet below the trestle.

Q. You were carried away, as I understand, with the house?

A. Yes, carried in the house. I was on top of the floor. My kitchen floor would be there; there

(Testimony of John Larson.)

was a pile of lumber on top of me, and my one hand was loose and I started to pull some lumber off my head, and I pulled out, and then John Anderson came in and he helped me lift me up.

Q. Describe the material in which you were buried?      A. Yes.

Q. What was it?      A. Water and mud.

Q. And about how long after the slide did you get out of there?

A. Oh, about a few minutes.

Q. About a few minutes?      A. Yes.

Q. All right. Now, I forgot to ask you something more about the house. How many rooms were in that house after you had it built up the way you said you had?

A. I had 16 rooms altogether.

Q. What was that house being used for?

A. Rooming-house.

Q. How long had you used it for a rooming-house?      A. Since 1915.

Q. What was that property worth?

Mr. HELLENTHAL.—I object to that as immaterial until he has shown his title.

The COURT.—Well, it seems to me Mr. Roden, that it is immaterial until you establish ownership in this [40] plaintiff.

Mr. RODEN.—I think he has established his life estate, your Honor, and that is sufficient ownership for the purposes of this suit.

Mr. HELLENTHAL.—Established what?



(Testimony of John Larson.)

Mr. RODEN.—Life estate by curtesy.

The COURT.—It depends upon what you are suing for. Let me see the complaint.

Mr. RODEN.—I think the authorities will help me out on that point. Of course the complaint is for the ownership—no question about that.

The COURT.—Your suit is founded, not on injury to the rooming-house business, but it is for the destruction of the premises themselves.

Mr. RODEN.—Yes, his life estate has been destroyed, and he has a right to sue for that—at least I think he has.

The COURT.—Did your wife die before or after the suit was commenced?

The WITNESS.—Died before.

The COURT.—Before this suit was commenced?

The WITNESS.—Yes, before.

The COURT.—This does not say that he is suing for a life estate—it says he is the owner of the property.

Mr. RODEN.—I know it says that. While it is true that the fee simple, the inheritable title does not belong to him, he certainly has an estate by curtesy, and I am quite positive that under those allegations in the complaint he can recover for the estate. It is true that he cannot make out the whole title which he sets up in his complaint—it is true that cannot be done.

(Argument by Mr. Roden.) [41]

(Testimony of John Larson.)

Direct Examination (Continued).

The COURT.—On the question that arose just before we took the recess, I think the plaintiff can recover the value of the estate by curtesy under this complaint; but I think it is the value of the estate that will have to be shown and not the value of the property. Of course, the value of the life estate depends a good deal upon the value of the property, but it is the value of the life estate—

Mr. RODEN.—I understand.

Q. (By Mr. RODEN.) Now, Mr. Larson, I didn't quite get you, before we adjourned, as to when your wife died.

A. She died in 1918; November 18th.

Q. November 18th, 1918 you say?

A. November 18, 1918, yes.

Q. She died in the hospital here, did she?

A. She died of the flu—the first flu that was here.

Q. The time of the flu epidemic in 1918; and you stated you and your wife were living together up to the time she went to the hospital?      A. Yes.

Q. Did you see your wife in the hospital?

A. I took her to the hospital—that is the only time I saw her there.

Q. How did it happen that you didn't see her again?

A. They wouldn't let me in there.

Q. Was the hospital quarantined at the time do you know?      A. Yes.

(Testimony of John Larson.)

Q. The hospital was quarantined, and that is why you didn't see her again? [42]      A. Yes.

Q. There was no trouble of any kind existing between you and your wife?      A. No.

Q. At the time you bought this property from Mr. Lund did you pay the money?      A. Yes.

Mr. HELLENTHAL.—I object to that as immaterial.

Q. How much was it—how much did you pay him?      A. \$1200.

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—It is preliminary.

Mr. RODEN.—You may answer that question.

The WITNESS.—I paid \$1200.

Q. And you stated that you made a lot of improvements there, and made a three story house out of the place?      A. Yes.

Q. How much money was paid out to change this house and put it up as it was at the time of the slide?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Of course that is not the measure of the damage, but it might throw some light on what the value was.

Mr. RODEN.—I understand the measure of damages would be the rental value during his life.

Q. How much money was spent in putting the building in the condition in which it was at the time of the slide?

(Testimony of John Larson.)

Mr. HELLENTHAL.—That is under my objection, your Honor.

The COURT.—Overruled. A. \$2600 [43]

Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list? A. Yes.

Q. And that was a little over \$3,000.

A. Yes.

Q. How much cash money was among that?

A. \$220.

Q. What did you use this house for, John?

A. I used it for a rooming-house.

Q. You and your family lived in the house?

A. Yes.

A. And you put it up for a rooming-house, and used it for a rooming-house—how many rooms did you have in the house to rent out?

A. I rented out 8 rooms.

Q. You rented 8 rooms. Did you use the house for any other purpose,—did you carry on a lodging-house there, too?

A. I used it for my own living and for a rooming-house.

Q. Just as a rooming-house? A. Yes.

Q. Can you tell the Court and jury what the rent of this house would bring per month?

A. Well, I generally averaged about \$50 or \$60 a month, from the rent.



(Testimony of John Larson.)

Q. You got that from the rent?      A. Yes.

Q. Did you do any work in the house?

A. Yes. [44]

Q. What work did you do in connection with the rooming-house?

A. Well, I was getting it clean and making beds.

Q. Did you at any time rent your house?

A. Yes, I had a chance to rent it, but I didn't want to rent it out.

Q. You had chances to rent it, did you?

A. Yes, after my wife died, there was two or three parties what wanted to rent it.

Q. Was there any talk between you and these parties as to how much rent they would pay?

A. Yes.

Mr. HELLENTHAL.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—It is too indefinite as to time and place.

Mr. RODEN.—I can make it definite, your Honor.

Q. You say several parties wanted to rent the house from you after your wife died?      A. Yes.

Q. About how long after your wife died?

A. Oh, it was about three months after my wife died.

Q. That would be in the early part of 1919, then?

A. Yes.

Q. Was there any time later—      A. Yes.

Q. How late was it?

A. About three months after that.

(Testimony of John Larson.)

Q. That would bring you about the middle of 1919?      A. Yes.

Q. Was there anybody offered you any rent for the house later than that? [45]      A. No.

Q. What offer did you have during this time you have mentioned?

A. I was offered about \$40 a month.

Q. About \$40 a month. Now, about the time the slide came and destroyed the house, had the rental value of the property changed any,—had it become more valuable for renting, or less?

A. No, the same thing.

Q. I cannot hear you.

A. No, it didn't change.

Q. Was it about the same then?      A. Yes.

Q. How old a man are you, John?      A. 38.

Q. And I think you stated this morning that you have been in good health?      A. Yes.

Q. Never suffered from any serious sickness, have you?      A. No.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You were behind the Koski house after a quarter to ten in the morning, weren't you, when you saw water coming over the bank there?

Mr. RODEN.—Will you excuse me one moment?

Mr. HELLENTHAL.—Yes, certainly.

Mr. RODEN.—I would like to offer in evidence

the bill of particulars that was filed, setting forth the property that was in the house. [46]

The COURT.—It will be received.

Whereupon said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O," and is in form and figures as follows, to wit:

"In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

### BILL OF PARTICULARS.

COMES NOW the plaintiff above named, and in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following:

### BILL OF PARTICULARS:

1 range, hot-water connections.....	\$ 70.00
1 range .....	80.00
3 heaters .....	31.00

60      *Alaska Juneau Gold Mining Company*

3 full sized bedsteads and bedding.....	210.00
7 three-quarter size bedsteads and bedding..	420.00
5 dressers or bureaus .....	75.00
1 dresser or bureau .....	20.00
4 center tables .....	16.00
1 kitchen table .....	10.00
5 kitchen chairs .....	13.50
19 rocking chairs .....	57.00
1 rocking chair .....	7.00
1 rocking chair .....	10.00
1 couch .....	16.00
1 couch .....	14.00
Cooking utensils .....	15.00
Plated dishes, etc. ....	25.00
1 doz. silver plated teaspoons .....	6.00
1½ doz. tablespoons, silverplated.....	6.00
1½ doz. each of knives and forks, silver- plated .....	10.00
1 wool carpet .....	50.00
<hr/>	
\$1,141.50	

[47]

Forwarded.....	\$1,141.50
1 sewing-machine .....	50.00
1 wool an dcotton carpet .....	30.00
1 trunk .....	20.00
Fishing gear, including 2 herring nets..	45.00
Set of carpenter tools.....	10.00
2 kitchen sinks with fittings.....	18.00
1 porcelain toilet, complete fitted.....	25.00



Pipes and fittings .....	75.00
1 Howard watch, 14 carat gold case.....	90.00
1 double nugget chain for watch.....	52.00
1 ladies gold watch, Waltham, 17 jewel...	60.00
1 ladies watch chain .....	35.00
1 ladies short nugget chain.....	15.00
1 wedding ring .....	10.00
1 man's buckle ring .....	15.00
1 boy's gold ring .....	5.00
2 nugget pins .....	6.00
1 ladies nugget brooch pin.....	8.50
Full brass band musical instruments...	750.00
Miscellaneous house furnishings, pic- tures, decorations, personal toilet articles, trinkets, etc.....	100.00
Cash .....	220.00
Personal clothes for self and child....	250.00

---

Total.....\$3,031.00

(Signed) JOHN RUSTGARD,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

John Larson, being first duly sworn, deposes and says: That he is the plaintiff above named, that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

JOHN LARSON.

(Testimony of John Larson.)

Subscribed and sworn to before me this —— day  
of June, 1920.

---

Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this —— day of  
June, 1920.

HELLENTHAL & HELLENTHAL,  
Attorneys for Defendant.” [48]

Q. (By Mr. HELLENTHAL.) That was about  
a quarter to ten, wasn't it, when you were there?

A. A quarter to or ten minutes to ten.

Q. Yes, about that time?      A. Yes.

Q. A little before ten o'clock?      A. Yes, sir.

Q. Between half-past nine and ten?      A. Yes.

Q. At that time you saw some water coming over  
the bank behind the Koski house?      A. Yes, I did.

Q. That water, was that clear or muddy—was it  
clear water or muddy water?

A. At the time I didn't look much—I only saw  
the water coming, and I was busy there at my own  
house, and I only noticed that water was coming  
there.

Q. There wasn't much water at that time?

A. No, there wasn't much.

Q. Not enough for you to stop and look at it?

A. Yes.

Q. I say there wasn't enough for you to stop and  
look at it—that is true?      A. Yes, I seen it there.

(Testimony of John Larson.)

Q. You saw water but you didn't pay much attention to it?     A. No.

Q. Because there wasn't very much—that is right, isn't it?

A. There was about two or three feet wide, the stream was, coming down.

Q. It wasn't big enough for you to stop—I mean to pay attention to it,—you didn't think much of it at that time, I mean?

A. No, I didn't pay any attention to it. [49]

Q. Did you see the rocks sliding down on the sidewalk at that time?

A. No, I didn't.

Q. Some muck and rocks come down?     A. No.

Q. You didn't notice it?

A. I didn't notice that.

Mr. HELLENTHAL.—That is all.

Direct Examination.

(By Mr. RODEN.)

Q. Mr. Larson, while your wife was alive who transacted all the business in connection with your rooming-house?     A. I myself.

Q. You did?     A. Yes.

Q. Who ordered and bought the stuff?

A. I did.

Q. Who paid for it?     A. I did.

Q. At the time your wife died do you know whether or not she left any debts?     A. No.

(Testimony of John Larson.)

Q. Has anybody ever presented a bill to you made by your wife?     A. No.

Q. Do you know whether anybody has ever applied to the probate court to have an administrator appointed?     A. No.

Q. Nobody ever has?     [50]

No other or further evidence was adduced at the trial tending to prove the extent of the injuries of the amount of the damages alleged to have been sustained by reason of the matters and things set forth in the complaint or otherwise, nor was there any other or further evidence tending to prove the value of the articles of property alleged in the complaint to have been injured or destroyed. The plaintiff, before the cause was submitted, voluntarily withdrew that portion of the complaint relating to injury or damage caused to the real property referred to in the complaint and confined his demand for damages to the injury sustained to the personal property referred to in the complaint. After all the evidence was in, and both sides had rested their cause, the defendant made a motion for a directed verdict, which is in words and figures as follows: [51]



In the District Court for the District of Alaska,  
Division No. One, at Juneau.

Case No. 1449-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Motion to Direct Verdict.**

Comes now the defendant and moves the Court to direct a verdict in favor of the defendant on the following grounds, to wit:

I.

That there is no evidence before the Court that the defendant was negligent in any respect whatsoever.

II.

That there is no evidence that the defendant was negligent in relation to any of the matters or things charged in the complaint or bill of particulars; but, on the contrary, the evidence shows that the defendant at all times referred to in the complaint and pleadings herein was in the exercise of the highest degree of care.

III.

That the evidence conclusively shows that water coming from the defendant's penstock or other

part of the defendant's flume or diverting works was not the proximate cause of the injury complained of, or the resulting damage; that the evidence conclusively shows that said water could not have flowed in the direction of the slide area, but for the intervention of an independent, intervening cause; that there is no evidence that the defendant was responsible for any obstruction to the natural drainage along which water would have drained to Portal Gulch, had it not been for such obstruction, whatever it might have been; that the evidence conclusively shows that the waters coming from the penstock, if any, [52] would have drained to Portal Gulch and not to the slide area, had it not been for some obstruction; and that there is no evidence of what such obstruction consisted, and especially no evidence that the defendant was responsible for its existence, whatever it may have been; or that it was such that the defendant should have anticipated or provided against. Furthermore, the evidence conclusively shows that if it had not been for the existence of the trail leading down the ridge in the direction of the slide area the water would have left the ridge and drained in the direction of one or the other of the two gulches that exist on either side of the ridge; and that there is no evidence that the defendant was responsible for the existence of said trail or for the fact that said trail carried the water, instead of permitting the same to follow the line of natural drainage.

## IV.

That there is no evidence of damage sufficient to enable the jury to find a verdict in favor of the plaintiff, or to assess the plaintiff's damages, if any, or to base a verdict for damages upon.

## V.

That there is no evidence of any of the matters or things charged in the complaint sufficient for the jury to find a verdict in favor of the plaintiff.

HELLENTHAL & HELLENTHAL,

Attorneys for the Defendant. [53]

And the Court, having duly considered the same, denied said motion, to which ruling and order of the Court the defendant by counsel then and there excepted; whereupon the court instructed the jury as follows: [54]

**Instructions of Court to the Jury.**

Gentlemen of the Jury:

This is an action brought by John Larson for the recovery of compensation for damages alleged to have been sustained by him by reason of a slide which occurred in the city of Juneau on the second day of January, 1920. The plaintiff alleges that the slide was occasioned by water escaping from the ditch, flume or penstock of the defendant company and running down the slope of the hill. It is claimed that the said water so escaped and ran down the hill by and through the negligence of the defendant.

It is established that plaintiff was damaged by the slide of January 2, 1920.

It is the contention of plaintiff that water escaping from the ditch, flume or penstock of defendant was a proximate cause of the slide which did the damage; while defendant contends, 1st, that no water in any appreciable amount escaped from the flume or penstock prior to the slide; 2d, that even if any such water did escape, yet such water was not a proximate cause of the slide.

### PROXIMATE CAUSE.

What is meant in law when one thing is said to be the cause of another? In one sense all things that go before are the cause of all things that come after, for all things that go before combine in some degree, infinitesimal though it may be, to produce the things that come after; but in law no such refinement can be indulged in for the law does not consider remote causes but only proximate causes, that is, near causes—near in point of potency—efficient causes. The law considers that to be a proximate cause which is an efficient cause—one that necessarily sets the other causes in operation. No event can be said to be the proximate cause of a subsequent event unless that subsequent event would not have happened if the particular event had not already happened.

So the first question that should present itself to you would be, did any water escape from the ditch, flume or penstock prior to [55] the landslide?



If you answer that in the affirmative, then you take up the question whether or not the escaping water was a proximate cause of the slide. In determining this question you should take into consideration what was the state of affairs existing at the time the water escaped, if it did escape; then consider how much water escaped, and where it flowed to, and what effect, if any, it had on the then existing state of affairs—all as shown by the evidence, for you cannot go beyond the evidence. If the water escaping (provided any such did escape) before the slide was of small quantity or force, and so little affected the then existing state of affairs that the slide would have occurred even if the water had not escaped, then the escaping water, if any, was not a proximate cause of the slide. On the other hand, if you find from the evidence that the escaping water, if any, was of such amount and force and so placed that acting upon the then existing state of affairs the slide was produced by its material assistance, and would not have happened but for that assistance, then the water was a proximate cause of the slide.

One thing may be a proximate cause and yet not the sole cause, for there may be more than one proximate cause. An occurrence may be the result of several happenings, each one materially contributing to bring about that event, but when that is the case no one of those things is a proximate cause of a particular result unless that result would

not have happened if that one supposed cause had not already happened.

In order to find that water flowing from the penstock, if any, was the cause of the slide it would not be essential that such water alone and unaided by other forces caused the slide, but it would be necessary that the said water was one of the material agencies in producing the slide and that such slide would not have occurred unless the water escaping from the flume did flow over the area of the slide.

[56]

The burden of proof to show that the escaping water, if you find that any water escaped before the slide, was a proximate cause of the slide, is on the plaintiff—that is to say, if the plaintiff would have you believe that this slide was caused by water escaping from the ditch, penstock or flume, he must produce (or rather there must have been produced in the case) stronger, weightier, more convincing evidence that the water was a proximate cause than the defendant would have to produce that the water was not a proximate cause.

If you do not find from a preponderance of the evidence that water escaping from the ditch, flume or penstock was a proximate cause, you should find for the defendant irrespective of any other considerations.

I have been directing your attention solely to the question of proximate cause of the slide, for the cause of the slide must be determined before you

would be in a position to say whether or not defendant is liable.

I come now to the question of liability. If in your opinion the preponderance of the evidence shows that water escaping from the flume or penstock was a proximate cause of the slide, you should then determine whether or not the water was permitted to escape through the negligence of the defendant, for the gist of this action is negligence.

Now, the defendant company had a right to divert the waters of Gold Creek and bring them around the mountain and utilize them by means of flume, ditch, penstock and pipe lines in the running of its mill. In doing this it is not an insurer against the infliction of damage. It is not liable for damages which may result from its so diverting the water if such work be done with ordinary care. While it has this right, however, to divert the waters of Gold Creek by bringing them around the mountain, yet if in so doing it negligently permits water to escape and cause damage, it is liable for the damage caused thereby, if any. [57] The second question, then, for you to consider is this: Was the escape of the water, if any water escaped before the slide, due to the negligence of the company in any of the particulars alleged in the complaint?

Negligence is the absence of that degree of care which an ordinarily prudent person having due regard for the welfare, the safety and the rights of

others would exercise under the circumstances of the particular case being inquired of. Now, the degree of care which an ordinarily prudent person would exercise in any given case is proportioned to the dangers reasonably to be apprehended and guarded against in the light and the view of all the circumstances and of the consequences if such dangers culminate in some untoward event.

In this case the particulars of negligence alleged by the plaintiff, and which particulars, or some of them at least, he must show by a preponderance of the evidence, are as follows, that is to say: Plaintiff alleges that "by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the distribution pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises in question, or otherwise occasioned any damage." He further alleges "that ordinary and reasonable care and caution on the part of the defendant required of it that it should have constructed and maintained at all times such waste flume to carry away such waste or surplus water, and that defendant was negligent in not providing such protection against injury from surplus or overflowing water at or near the penstock." Plaintiff further alleges that "defendant was negligent in that it failed to provide and maintain a



series of spillways along its flume by which spillways surplus water could and would be released from the flume before it reached the penstock." He further alleges that the overflow water of which he complains and which he alleges [58] caused the damage herein complained of "was known to the defendant to be so flowing and likely to cause said damage long prior" to the occurrence of the slide complained of, or would, by the exercise of reasonable care on the part of the defendant have been "known to it long prior to the said slide and prior to any damage that would have been done by the said water." He further alleges "that defendant was negligent in not shutting off said water and preventing said overflow before any damage was occasioned thereby," and that it "wrongfully and unlawfully permitted the said water to flow upon the said premises."

Now, it is for you to say, from the evidence in this case, what, if any, dangers would have been reasonably anticipated by the ordinarily prudent man as likely to arise; and then it is for you to determine, also, what, if any, precautions an ordinarily prudent man would have taken under the circumstances to avert the dangers that could be reasonably anticipated, and then if there are any precautions which the ordinarily prudent man would have taken, it is for you to say whether or not the defendant did take such precautions. Defendant would be held to the duty of taking such precautions

as the ordinarily prudent man would take against the dangers which an ordinarily prudent man would anticipate as being likely to arise. It would not be held to the duty of taking any more precautions. If, for instance, an ordinarily prudent man under the circumstances would have deemed it a wise or necessary precaution, or one called for under the circumstances, to build a waste pipe or conduit or spillways to catch any overflow water that might escape from the penstock or flume, then the defendant should have taken such precaution. If, on the other hand an ordinarily prudent man would have considered that under the circumstances there was either no danger that the water would overflow at the penstock, or if so, that it would do any damage if it did overflow, then the defendant could not be held to liability for not building such waste pipe, conduit or spillways. [59]

In short, did the defendant in this regard do or omit to do anything which an ordinarily prudent person would not have done or omitted to do, as the case may be, under the circumstances? If the answer is in the affirmative, then the defendant was negligent just in so far as it failed to live up to the standard which an ordinarily prudent man would set for himself. If the answer is in the negative, the defendant was not negligent.

To state again, essentially negligence is not the absence of high care nor the presence of low care or of no care, but it is the absence of that care which an ordinarily prudent person would exercise under the circumstances. Under some circumstances an

ordinarily prudent person would exercise a high degree of care, and under other circumstances he would not be so careful,—it is for you to say, from the evidence, what the circumstances were,—that is, what the conditions were, what the dangers to be apprehended were, what precautions were wise or necessary to be taken, and what care an ordinarily prudent person, bearing all these things in mind, would have taken, and whether or not the defendant exercised that amount of care.

Negligence is never presumed. It must be proved by a preponderance of evidence, and it must also be proved by a preponderance of the evidence that the negligence proven, if any, was the cause of the disaster complained of in any given case—that is to say, plaintiff cannot recover on the score of negligence unless it appears from the preponderance of the evidence that at least one particular of the negligence complained of existed, and he will have to prove in addition that that particular act of negligence was the proximate cause of the injury proven, if any.

The fact, if it be a fact, that before the escape of the water Koski or his predecessors made an excavation in the bank or hill and that the slide would not have occurred but for that excavation, will not excuse the defendant if the escape of the water was a proximate cause, as I have defined proximate cause, and if that escape was due to the negligence of the defendant, as I have [60] defined negligence, provided you find that the slide would not have been produced at all had it not

been for the negligent act of the defendant.

Of course, if the said cut in the bank, either alone or combining with natural causes over which the defendant had no control, produced the slide, the defendant would not be liable; but if the cut in the bank and natural causes, combined with the negligent act of the defendant in allowing water to escape from its penstock, if you find that any such water did escape, and that its escape was due to negligence,—I say, if all these things combined produced the slide, and if the slide would not have been produced except for the said negligent act, if you find it was a negligent act, then the defendant would not be liable, and your verdict should be for plaintiff.

To make the matter a little plainer, Gentlemen, where a cause produced by a negligent act of a defendant combines with causes for which the defendant is not responsible to produce a casualty, the law does not consider the negligent act as the proximate cause of the casualty unless it be true that the casualty would not have been produced except for that negligent act, and that an ordinarily prudent man under all the circumstances would have known or should have known that a casualty might result from that negligent act.

Applying that principle of law to this case, you are instructed that if you find that water escaped from the flume due to the negligence of the defendant and materially contributed to produce the slide, but that an excavation or excavations and the rains and the snows and other conditions for which the



defendant is not responsible, also contributed to produce the slide, you cannot find a verdict against the defendant unless you also find that the slide would not have been produced except for the escaping water and that an ordinarily prudent person would have known or should have known that the natural and probable consequences of the escape of the water would have been to produce a slide or like casualty. [61]

You are the sole judges of the weight of the testimony and the credibility of the witnesses. You must decide the case on the evidence and the instructions of the Court, and not take into consideration any extraneous matters. You are to decide the case without fear or favor or sympathy. If the water was the cause of the slide and defendant was negligent, it is but meet and proper that it should compensate the plaintiff for the damage inflicted. If water escaping from the defendant's flume or penstock was not the cause of the slide, or if the defendant was not negligent in the particulars pointed out in the complaint and bill of particulars, then it would be manifestly unjust to take money out of its pocket to compensate the plaintiff for damages which did not arise from its delinquency.

You make up your minds which witnesses are to be believed when they testify in court much the same as you do when they tell you a story outside of court—you size up the witness—you observe his appearance and demeanor—you note whether he is frank and candid—whether he has shown a disposition to tell the truth, the whole truth, about the mat-

ters of which he has testified; you consider how he stood cross-examination; you consider what interest he has in the story told and whether or not that interest has colored his testimony, and if so, to what extent; and from all the facts and circumstances appearing in the case make up your mind whom to believe and what to believe.

In this case expert testimony has been introduced on both sides. You should weigh the testimony of expert witnesses in the same manner as you weigh that of other witnesses,—that is to say, you are not bound to believe any expert unless his testimony seems reasonable under the circumstances. When matters beyond the ken of ordinary observation and experience matters requiring special or technical knowledge arise, experts are called who are specially versed in those matters—they give their opinions for their reasons, and you weigh the whole matter. After all, it is what you believe that testimony is and what inferences you think ought to be drawn from it, that controls. [62]

Arguments of counsel are not evidence. It is meet and proper that they should give their recollection of the evidence, and state the inferences which they think you should draw from that evidence, but as said before, it is your recollection of the evidence and your judgment as to the inferences which are to govern your verdict.

If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You can-

not allow anything by way of punitive damages or smart money. You have nothing to do with the costs in this case one way or the other.

There is a claim made for \$3,800, the alleged value of the real estate. In that connection you are instructed that plaintiff has shown that he has only a life estate in the real estate, and no evidence has been introduced as to what was or is the value of that life estate. Consequently, you cannot allow any sum for the loss or destruction of the house and lot. If you allow damages the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been lost or destroyed. Plaintiff alleges that his loss in that regard is \$3,020. If you find for plaintiff, you will determine from the evidence what articles were lost, and if any such were lost, then the value thereof.

If you find a verdict in this case you will answer the following questions:

- (1) Was water escaping from the ditch, flume or penstock a proximate cause of the slide?
- (2) Was the defendant negligent in any of the particulars set forth in the complaint and bill of particulars?
- (3) If so, in what did that negligence consist?

You will elect one of your number as foreman and he will sign the form of verdict that you may agree upon. You will be handed two forms of verdict, one in favor of plaintiff and one [63] in favor of the defendant. The verdicts speak for themselves, so it will be easy for you to determine

which one applies, according as your decision may be.

To which instructions so given by the Court the defendant at the time the instructions were given and before the jury retired, duly and regularly made the following objections and took the following exceptions:

“Defendant objects and excepts to that portion of the charge relating to the amount that could be assessed, or the measure of damages, as there is no evidence that will enable the jury to determine the market value of the articles of property which it is claimed were lost or destroyed, the evidence on this question being wholly lacking, and in other respects insufficient to enable the jury to assess any damages or arrive at the question of market value.”

which exception was then and there allowed by the Court; whereupon the jury retired to deliberate of their verdict, and having agreed upon a verdict, returned to the court a verdict which is in words and figures as follows:

“In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.



**Verdict.**

We, the jury duly empanelled and sworn in the above-entitled cause, do find for the plaintiff, and assess the amount of his recovery at \$1,510.00.

Dated at Juneau, Alaska, May 8, 1921.

DAVID WAGGONER,  
Foreman." [64]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

**Certificate of Judge Allowing and Settling Bill of  
Exceptions.**

This matter coming on to be heard on the motion of the Alaska Juneau Gold Mining Company to settle and allow the above and foregoing bill of exceptions herein, and it appearing that the above and foregoing cause came on regularly for trial before the Honorable Robert W. Jennings, the then Judge of this court, at the time and place mentioned in the foregoing bill of exceptions, and that the proceedings therein set forth were duly had, and that the proceedings had upon the said trial were

duly reported and recorded by the court stenographer and the stenographic notes thereof were duly kept, and that the foregoing bill of exceptions is a true, accurate and correct statement of all that occurred at the trial of said cause and contains all the evidence adduced at the said trial which proved or tended to prove the injuries complained of, or the damages sustained, and all the evidence which proved or tended to prove the value of the property alleged to have been either injured or destroyed. it being agreed by both parties, in open court, that the foregoing recital of what said bill of exceptions contains is true and correct, and that the said bill of exceptions in all respects speaks the truth.

Said bill of exceptions is hereby settled and allowed by me, the undersigned Judge of the District Court for the Territory of Alaska, Division No. 1, and successor to the said Honorable Robert W. Jennings. [65]

And I further certify that the said bill of exceptions was duly presented to the Court within the time allowed therefor, and it is ordered that the same so settled and allowed is made a part of the record in this cause.

Done in open court this 31st day of October, 1921.

T. M. REED,  
Judge. [66]

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

In the United States Circuit Court of Appeals for  
the Ninth Circuit, Holden at San Francisco.

Case No. 1949-A.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

**Petition For Writ of Error.**

To the Honorable ROBERT W. JENNINGS,  
Judge of the District Court, for the Territory  
of Alaska, Division Number One:

Comes now the above-named Alaska Juneau Gold  
Mining Company, a corporation, the plaintiff in  
error herein, by its attorneys, Hellenthal & Hellen-  
thal, and complains that in the record and proceed-  
ings had in the District Court for the Territory of

Alaska, Division Number One, in Case No. 1949-A, John Larson, plaintiff and defendant in error, against the Alaska Juneau Gold Mining Company, defendant, and plaintiff in error, and also the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against Alaska Juneau Gold Mining Company on the 14th day of May, 1921, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Juneau Gold Mining Company to be indebted to the plaintiff John Larson in the sum of \$1,510.00, and therein the plaintiff John Larson was given judgment against the defendant, the Alaska Juneau Gold Mining Company for the sum of \$1,510.00 and [67] costs taxed at \$170.75 manifest error hath happened to the great damage of said Alaska Juneau Gold Mining Company as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Juneau Gold Mining Company prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of July, 1921.

HELLENTHAL & HELLENTHAL,  
Attorneys for the Alaska Juneau Gold Mining  
Company.

Copy received.

HENRY RODEN,  
Attorney for John Larson.



Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy. [68]

---

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount  
of Supersedeas and Cost Bond.**

This matter coming on to be heard on the petition of the Alaska Juneau Gold Mining Company for a writ of error, the assignment of errors having been regularly filed with said petition, the writ of error is hereby allowed as prayed for in said petition and the amount of the supersedeas and cost bond is fixed at two thousand dollars, to be approved by the court or the clerk thereof.

Dated this 13th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy.

Entered Court Journal, No. D, page 105. [69]

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the  
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, the Alaska Juneau Gold Mining Com-  
pany, a corporation, as principal, and L. S. Ferris,  
as surety, are held and firmly bound unto the above-  
named John Larson in the just and full sum of  
Two Thousand Dollars (\$2,000.00), to be paid to  
the said John Larson, his attorneys or assigns, to  
which payment, well and truly to be made, we bind  
ourselves, our heirs, executors and administrators,  
jointly and severally by these presents.

Sealed with our seals and dated this 13th day of July, 1921.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between John Larson as plaintiff, and the Alaska Juneau Gold Mining Company, as defendant, a judgment was rendered against the said Alaska Juneau Gold Mining Company for the sum of \$1,510.00 and costs, and the said Alaska Juneau Gold Mining Company having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the [70] aforesaid action and the citation directed to the said John Larson, citing and admonishing him to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date of approval of this bond.

NOW, the condition of the above obligation is such that if the said Alaska Juneau Gold Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then and in that event the above obligation to be void; otherwise to remain in full force and virtue.

ALASKA JUNEAU GOLD MINING  
COMPANY,

By SIMON HELLENTHAL,

Its Attorney,

Principal.

L. S. FERRIS,

Surety.

Signed, sealed and delivered in the presence of:

W. B. SHARPE.

A. B. VAN ZANDT.

Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy.

Approved, July 13, 1921.

J. W. BELL,  
Clerk. [71]

---

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the  
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.



**Writ of Error.**

United States of America,—ss.

The President of the United States of America, to  
the Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the Territory  
of Alaska, Division Number One, GREET-  
ING:

Because of the record and proceedings, as also  
in the rendition of the judgment of a plea, which  
is in said District Court, Division Number One  
thereof, before you, between John Larson, as plain-  
tiff, and the Alaska Juneau Gold Mining Com-  
pany, a corporation, as defendant, a manifest error  
hath happened to the great prejudice and damage  
of the said Alaska Juneau Gold Mining Company  
as set forth and appears by the petition herein.

We, being willing that error, if any hath [72]  
happened, should be duly corrected and full and  
speedy justice done to the parties aforesaid in this  
behalf, do command you, if judgment be therein  
given, that then under your seal distinctly and  
openly you send the records and proceedings afore-  
said with all things concerning the same to the Jus-  
tices of the United States Circuit Court of Appeals  
for the Ninth Circuit, in the city of San Francisco,  
in the State of California, together with this writ,  
so as to have the same at said place and said Circuit  
on or before thirty days from the date hereof that  
the record and proceedings aforesaid being inspected  
the said Circuit Court of Appeals may cause fur-  
ther to be done therein to correct those errors what

of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this — day of July, A. D. 1921.

Attest my hand and seal of the District Court for the Territory of Alaska, Division Number One, at the Clerk's office at Juneau, on the day and year last above written.

[Seal]

J. W. BELL,  
Clerk of the District Court for the Territory of  
Alaska, Division Number One.

Allowed this 13th day of July, A. D. 1921.

ROBERT W. JENNINGS,  
Judge.

Copy received.

HENRY RODEN,  
Attorney for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy. [73]

---

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the  
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

**Citation on Writ of Error.**

The President of the United States to John Larson,  
the Above-named Plaintiff, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Juneau Gold Mining Company, a corporation, is the plaintiff in error and you, the said John Larson, are the defendant in error, to show cause, if any there by, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to [74] the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 13th day of

July, A. D. 1921, and of the Independence of the United States the 145th.

ROBERT W. JENNINGS,  
Judge.

Copy received.

HENRY RODEN,  
Attorney for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. July 13, 1921. J. W. Bell, Clerk.  
By ———, Deputy. [75]

---

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,  
Plaintiff,  
vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,  
Defendant.

**Order Extending Time Sixty Days to Forward  
Record on Appeal to U. S. C. C. A. (Dated  
July 13, 1921).**

On motion of Hellenthal & Hellenthal, attorneys  
for the above-named defendant, made in open court,  
and it appearing to the Court that the bill of excep-  
tions in the above-entitled cause cannot be settled  
and the transcript on appeal in said cause can-



not be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within thirty days from the date of the citation herein,—

IT IS ORDERED that sixty days' additional is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 13th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk.  
By———, Deputy.

Entered Court Journal No. D, page 105. [76]

---

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

**Order Extending Time Ninety Days to Forward  
Record on Appeal to U. S. C. C. A. (Dated  
September 7, 1921).**

On motion of Hellenthal & Hellenthal, attorneys

for the defendant above-named made in open court, and it appearing to the court that the bill of exceptions in the above-entitled cause cannot be settled and the transcript on appeal in this case cannot be had out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted in July,—

IT IS ORDERED that ninety days' additional time from the date hereof is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 7th day of September, 1921.

ROBERT W. JENNINGS,  
Judge.

O. K.—RODEN & DAWES.

Filed in the District Court, District of Alaska, First Division. Sept. 7, 1921. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy.

Entered Court Journal No. Q, page 319. [77]

---

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,  
Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,  
Defendant.

**Order Extending Time Forty Days to Forward  
Record on Appeal to U. S. C. C. A. (Dated  
November 22, 1921).**

On motion of Hellenthal & Hellenthal, attorneys for the defendant above-named made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted,—

IT IS ORDERED that forty days' additional time from the date hereof is hereby granted in order to forward and file the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 22d day of November, 1921.

THOS. M. REED,  
Judge.

O. K. —HENRY RODEN.

Filed in the District Court, District of Alaska, First Division. Nov. 22, 1921. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. Q, page 419. [78]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

**Order Extending Time to and Including January 10,  
1922, to Forward Record on Appeal to U. S.  
C. C. A.**

On motion of Hellenthal & Hellenthal, attorneys for the defendant above-named made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and extension granted,—

IT IS ORDERED that an extension of time to and including January 10, 1922, is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 16th day of December, 1921.

THOS. M. REED,  
Judge.

O. K.—RODEN.



Filed in the District Court, District of Alaska,  
First Division, Dec. 16, 1921. John H. Dunn,  
Clerk. By L. E. Spray, Deputy. [78-A]

---

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

In the United States Circuit Court of Appeals for  
the Ninth Circuit, Holden at San Francisco.

Case No. 1949-A.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

**Assignment of Errors.**

Comes now the Alaska Juneau Gold Mining Com-  
pany, the plaintiff in error, and assigns the follow-  
ing errors committed by the Court in connection  
with the trial and rendition of judgment herein,

the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

FIRST ERROR ASSIGNED.

The Court erred in denying the defendant's motion for a directed verdict.

SECOND ERROR ASSIGNED.

The Court erred in instructing the jury as follows:

"If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money. \* \* \* If you allow damages the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been *lost destroyed*. Plaintiff alleges that his loss in that regard is \$3,020. If you find for plaintiff you will be determining from the evidence what articles were lost, and if any such were lost, then the value thereof."

HELLENTHAL & HELLENTHAL,  
Attorneys for the Alaska Juneau Gold Mining  
Company.

Copy received.

HENRY RODEN,  
Attorney for Plaintiff.

Filed in the District Court for the District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ———, Deputy. [79]

---

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

Case No. 1949-A.

JOHN LARSON,

Plaintiff,

VS.

ALASKA JUNEAU GOLD MINING COMPANY,  
a Corporation,

Defendant.

**Praecipe for Transcript of Record.**

Kindly prepare certified copies for transmission to the Circuit Court of Appeals in connection with your return on the writ of error herein, as follows: Complaint and bill of particulars, answer, reply, bill of exceptions, petition for writ of error, order allowing writ of error and fixing amount of supersedeas bond, supersedeas bond and order approving same, writ of error, citation, orders extending time and assignments of error.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division, Nov. 8, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy. [80]

**Certificate of Clerk U. S. District Court to Transcript of Record.**

In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

United States of America,  
District of Alaska,  
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached eighty-one pages of typewritten matter, numbered from one to 80, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for plaintiff in error on file in my office and made a part hereof, in cause No. 1949-A, wherein Alaska Juneau Gold Mining Company, a corporation, is defendant and plaintiff in error, and John Larson is plaintiff and defendant in error.

I further certify, that the said record is by virtue of a writ of error and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to the sum of Thirty-seven and 20/100 Dollars (37.20) has been paid to the counsel for plaintiff in error.



IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 16th day of December, 1921.

[Seal]

JOHN H. DUNN,

Clerk.

By \_\_\_\_\_,

Deputy. [81]

---

[Endorsed]: No. 3815. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff in Error, vs. John Larson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 27, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy.

---

**Certificate of Clerk U. S. District Court to Original Judgment.**

United States of America,  
District of Alaska,  
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full,

true and correct copy of the original Judgment in cause No. 1949-A, entitled John Larson, Plaintiff, vs. Alaska Juneau Gold Mining Company, a Corporation, Defendant. This certificate and paper to complete the transcript of the record on appeal in the above-entitled cause on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court at Juneau, Alaska, this fourth day of January, 1921.

[Seal]

JOHN H. DUNN,  
Clerk.

By \_\_\_\_\_,  
Deputy. [82]

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

### **Judgment.**

This cause came regularly on for trial on the 20th day of April, 1921, the plaintiff appearing in person and by his attorneys, Messrs. Roden & Dawes, and the defendant appearing by its attor-

neys, Messrs. Hellenthal & Hellenthal. A jury consisting of twelve qualified citizens of the United States of America and residents of the Territory of Alaska was duly empaneled and sworn to try the said action. Witnesses on behalf of plaintiff and defendant were sworn and examined and thereafter, having heard the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into court and filed with the clerk their verdict, which was for the plaintiff and against the defendant and in the words and figures as follows, to wit:

“In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

### VERDICT.

We, the jury duly empanelled and sworn in the above-entitled cause, do find for the plaintiff, and assess the amount of his recovery at \$1,510.00.

Dated at Juneau, Alaska, May 8th, 1921.

DAVID WAGGONER,

Foreman.”

And the Court having submitted special questions

to the jury, the jury also returned a special verdict in favor of the plaintiff, which was as follows, to wit: [83]

“In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COM-  
PANY, a Corporation,

Defendant.

ANSWERS TO QUESTIONS PROPOUNDED  
TO JURY.

We, the jury duly empanelled and sworn, in the above-entitled cause, to answer the special interrogatories propounded to us as follows:

1. Was water escaping from the ditch, flume or penstock a proximate cause of the slide?

Answer: Yes.

2. Was the defendant negligent in any of the particulars set forth in the complaint?

Answer: Yes.

3. If so, in what did that negligence consist?

Answer: By not constructing a ditch, flume or pipe to carry off any overflow of water from penstock to a place of safety.

DAVID WAGGONER,

Foreman.”

And the time for filing a motion for a new trial having expired and it now appearing to the Court



that judgment should be entered in favor of the plaintiff and against the defendant, it is now:

ORDERED AND ADJUDGED that the plaintiff, John Larson, do have and recover of and from the defendant, Alaska Juneau Gold Mining Company, a corporation, the sum of One Thousand Five Hundred Ten (\$1,510.00) Dollars, with interest thereon at the rate of 8% per annum from the date hereof until paid, together with his costs and disbursements herein expended taxed by the clerk.

Sixty days are allowed to prepare and file a bill of exceptions and stay of execution for said sixty days is hereby *stayed*.

Dated at Juneau, Alaska, this 14th day of May, 1921.

ROBERT W. JENNINGS,  
District Judge.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk.  
By ———, Deputy.

Entered Court Journal No. Q, pages 272, 273.  
[84]

[Endorsed]: No. 3815. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff in Error, vs. John Larson, Defendant in Error. Certified Copy of Judgment. Filed Jan. 12, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



No. 3815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

ALASKA JUNEAU GOLD MINING COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

JOHN LARSON,

*Defendant in Error.*

---

BRIEF FOR PLAINTIFF IN ERROR.

---

HELLENTHAL & HELLENTHAL,  
*Attorneys for the Plaintiff in Error.*

FILED

FEB 7 - 1922

F. D. MONCKTON,  
CLERK





No. 3815

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY  
(a corporation),

*Plaintiff in Error,*

VS.

JOHN LARSON,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of Facts.

This action was brought by the defendant in error against the plaintiff in error to recover damages to property occasioned by landslide alleged to have been caused by the negligence of plaintiff in error.

Defendant in error claimed to have been the owner of a house and certain articles of personal property situated thereon, which he claimed was destroyed by landslide caused by water escaping from diverting works of the plaintiff in error maintained on the mountainside above the mass which slid and caused the injury.

The plaintiff in error denied all the allegations in the complaint and claimed that the landslide referred to in the complaint was brought about as the result of an excavation made in the toe of the mass that slid, by one Koski, which took away the lateral support of the mass, and by rain and melting snow, which made the mass heavy and slippery.

The plaintiff in error also denied all the allegations of the complaint relating to the injury and damage. Before the case went to the jury, that portion of the defendant in error's claim relating to the real property was withdrawn and expressly waived so that the only part of the claim submitted to the jury related to injury done, if any, to the personal property referred to in the complaint as the "Bill of Particulars".

The jury found the verdict for the defendant in error upon which judgment was entered. To reverse this judgment, this writ of error was sued out.

The bill of exceptions contains all the evidence adduced at the trial, which proved or tended to prove the injuries complained of or the damages sustained and all the evidence which proved or tended to prove the value of the property alleged to have been either injured or destroyed, but does not contain the evidence relating to other issues raised by the pleadings and submitted to the jury.

The only point, therefore, that will be presented to this court is whether there was or was not such evidence of injury and resulting damage as would

warrant the trial court to submit the case to the jury or enter judgment upon the verdict.

---

## Errors Assigned and Relied Upon for Reversal.

### FIRST ERROR ASSIGNED.

The court erred in denying the defendant's motion for a directed verdict.

### SECOND ERROR ASSIGNED.

The court erred in instructing the jury as follows:

"If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money. \* \* \* If you allow damages, the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been *lost destroyed*. Plaintiff alleges that his loss in that regard is \$3,020. If you find for the plaintiff you will be determining from the evidence what articles were lost, and if any such were lost, then the value thereof."

---

### Argument.

The motion to direct a verdict was based upon several counts, one of which, only, will be urged here, which was that there was not evidence of injury or damage upon which the jury could base a

verdict for damages. This same point was also made by an exception taken to the portion of the court's charge referred to in the Second Error Assigned. The exception so taken being as follows:

“Defendant objects and excepts to that portion of the charge relating to the amount that could be assessed, or the measure of damages, as there is no evidence that will enable the jury to determine the market value of the articles of property which it is claimed were lost or destroyed, the evidence on this question being wholly lacking, and in other respects insufficient to enable the jury to assess any damages or arrive at the question of market value.”

It will be noted that no special fault is found with the charge of the court, except that there was no evidence on which to base it. Both errors assigned, therefore, relate to the single point that there was no evidence upon which the jury could calculate the damage done or find the market value of the property alleged to have been either injured or destroyed. The same point having been raised, first, by a motion to direct a verdict, and second, by exception taken to the charge.

All the evidence relating either to the injury sustained or damage done or value of the property alleged to have been either injured or destroyed was the evidence of the plaintiff, Larson, and was as follows:

“Q. What was in the house, John, in the way of furniture?

A. Furniture was in there.

Q. Have you got a list of the stuff you had in there?

A. Yes.

Q. All right, you may use that list and tell us what was in there.

A. One range stove, hot water connection, \$70.00.

The COURT. If he has a list of it, just submit the list.

Q. Have you a list there?

A. Yes.

Q. Is that a true statement, what you have got there, of what was in the house?

A. Yes.

Q. On the day of the slide?

A. Yes.

Q. Who did that property belong to that was in the house there?

Mr. HELLENTHAL. That is the personal property.

Mr. RODEN. The personal property, yes—who did that belong to?

A. It belongs to me.

Mr. RODEN. It belonged to you. All right. We desire to introduce in evidence this list of personal property that was upon the premises.

The COURT. It is attached to the complaint?

Mr. RODEN. No, your Honor, but I understand counsel asked for a bill of particulars and that is a bill of particulars. (34)

Mr. HELLENTHAL. It goes in evidence only to the extent of being an enumeration of the property. The list also contains the valuation of each article—we do not object to that, of course.

The COURT. Fix the valuation so the whole thing may go in, Mr. Roden.

Mr. RODEN. What is the total value of the property, do you know, John?

A. I cannot say.

Q. That is the total there, I guess.

A. \$3031.00."



Whereupon, said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O" and is in form and figures, as follows, to wit:

PLAINTIFF'S EXHIBIT "O".

*"In the District Court for the District of  
Alaska, Division Number One, at Juneau.*

Case No. 1949-A.

John Larson,	Plaintiff,
vs.	
Alaska Juneau Gold Mining Company (a corporation),	Defendant.

Bill of Particulars.

Comes now the plaintiff above named and, in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following: (35)

Bill of Particulars.

1 range, hot-water connections.....	\$ 70.00
1 range .....	60.00
3 heaters .....	31.00
3 full size bedsteads and bedding.....	210.00
7 three-quarter size bedsteads and bedding .....	420.00
5 dressers or bureaus.....	75.00
1 dresser or bureau.....	20.00
4 center tables.....	16.00
1 kitchen table.....	10.00
5 kitchen chairs .....	13.50
19 chairs .....	57.00
1 rocking chair.....	7.00

1 rocking chair.....	10.00
1 couch .....	16.00
1 couch .....	14.00
Cooking utensils.....	15.00
Plated dishes, etc.....	25.00
1 doz. silver plated teaspoons.....	6.00
1/2 doz. tablespoons, silver plated.....	6.00
1/2 doz. each of knives and forks, silver plated .....	10.00
1 wool carpet.....	50.00
1 sewing machine.....	50.00
1 wool and cotton carpet.....	30.00
1 trunk .....	20.00
Fishing gear, including 2 herring nets .....	45.00
Set of carpenter tools.....	10.00
2 kitchen sinks, with fittings.....	18.00
1 porcelain toilet, complete fitted.....	25.00
Pipes and fittings.....	75.00
1 Howard watch, 14 carat gold case....	90.00
1 double nugget chain for watch.....	52.00
1 ladies' gold watch, Waltham, 17 jewel .....	60.00
1 ladies' watch chain.....	35.00
1 ladies' short nugget chain.....	15.00
1 wedding ring.....	10.00
1 man's buckle ring.....	15.00
1 boy's gold ring.....	5.00
2 nugget pins.....	6.00
1 ladies' nugget brooch pin.....	8.50
Full brass band musical instruments	750.00
Miscellaneous house furnishings, pictures, decorations, personal toilet articles, trinkets, etc.....	100.00
Cash .....	220.00
Personal clothes for self and child....	250.00

Total .....	\$3031.00
(Signed)	JOHN RUSTGARD, Attorney for Plaintiff.

United States of America,  
Territory of Alaska.—ss.

John Larson, being first duly sworn (36), deposes and says: That he is the plaintiff above named; that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

John Larson.

Subscribed and sworn to before me this.....  
day of June, 1920.

.....  
Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this..... day  
of June, 1920."

(See Record, pages 44-45-46-47-48.)

"Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list?

A. Yes.

Q. And that was a little over \$3000.

A. Yes.

Q. How much cash money was among that?

A. \$220."

(See Record, page 56.)

There was no direct evidence that any of the articles of personal property above referred to were either injured or destroyed, unless this may be inferred from the fact that the house in which these articles of property were contained, was destroyed by the slide. Even if it should be said that this were some evidence which would tend to show that the property might have been injured or damaged, it

would certainly not tend to establish its total loss or destruction.

A more complete lack of evidence, however, is encountered when we come to consider the evidence upon which the jury were supposed to rely in calculating the amount of the damages.

Prior to the trial, and while the issues were being made up, a demand was made for a bill of particulars setting forth the items of property destroyed or injured. This bill of particulars was furnished. Upon the trial this bill of particulars was offered and received in evidence. Before it was offered, the plaintiff testified that the list containing the bill of particulars was a true statement of what was in the house on the day of the slide and that the property enumerated belonged to him.

No evidence was given relating to the value of the property, except the following:

“Mr. RODEN. Q. What is the total value of the property, do you know, John?

A. I cannot say.

Q. That is the total there, I guess.

A. \$3031.00.”

And after the bill of particulars was so received in evidence, the following questions were asked, to which the following answers were made:

“Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list?

A. Yes.

Q. And that was a little over \$3000.00.

A. Yes.

Q. How much cash money was among that?

A. \$220."

No witness testified concerning the condition, quality or state of repair of a single item mentioned in the bill of particulars, either before or after the injury, if injury were inflicted. Not a single one of the items was described. No one testified as to whether the same were old or new—as far as the evidence goes, they might have been perfectly new or entirely worn out, of good quality or of very inferior quality. The list is headed by two ranges, but no one testifies as to whether these were good, bad or indifferent. A little farther on we find three full-sized beds and bedding listed at \$200, seven three-quarter sized beds and bedding \$420.

If these bedsteads were made of mahogany they might be worth the amount at which they are listed, or even very much more; on the other hand, if they were cheap iron bedsteads, they should be worth very much less, but no one enlightens us upon this point.

Farther on we find the item, full brass band musical instruments, \$750. No witness testifies as to what these musical instruments were or what the item was supposed to contain, except the information which is contained in the words "full brass band musical instruments". Then we find the item cash \$220. It would seem clear enough that cash could not very well be destroyed by a landslide. The worst that



could happen to it would be that it might be lost, but no one testifies to having made any effort to find this cash or to any other fact or facts from which it might be inferred that this cash was lost.

Clearly the plaintiff in error could not prove that the items listed were not worth the amounts at which they were listed. No witness could be called, for instance, to say the range was not worth \$70. Some ranges are undoubtedly worth that much or more and others very much less. And what is true of the first item, the range, is true of every other item on the list.

If this were to be considered evidence, then the defendant in the action brought to recover for a loss or injury to property would be entirely helpless. The plaintiff could file his list and rest, as was done in this case and that would settle the controversy as far as that particular issue was concerned.

He might, with equal propriety, file his whole complaint in evidence and then claim that there was evidence of all the allegations set forth in the complaint. This bill of particulars is nothing more nor less than a part of the complaint.

Before the defendant in error could recover in this case it was incumbent upon him to prove that the items of property listed were entirely destroyed or if injured merely, the extent to which the same were injured. This done, it was incumbent upon him to prove what the market value was of the things totally destroyed at the time of their destruc-

tion and in case of such articles as were only injured, to prove the market value prior to the time of the injury and the market value after the injury was received.

In addition to this he would be called upon to show just what each item of property consisted of, its state of repair or preservation and produce such other evidence, descriptive of each article as would enable the jury to determine whether the thing lost or injured was identical with the thing concerning which evidence of market value was adduced. The measure of damages in the case of property lost or destroyed being its market value at the time of its loss or destruction, together with interest thereon and in case of property injured, the difference between the market value before the injury and the market value after the injury, together with interest thereon.

If any of the property destroyed or injured were of a character that it had no market value, then it would be incumbent upon the party suing for its loss or injury to establish that fact with competent evidence, then to proceed to show its exact condition before and after the injury so that the jury would be able to say just what the loss or injury consisted of and the other side would be able to meet the claim presented and then produce evidence of the cost of the article, the cost of repair, the age of the article, evidence upon the extent to which it had been worn, or the extent to which it

had depreciated, caused through wear or age, evidence of the amount for which similar articles could be replaced and other like evidence touching the question of value, to enable the jury to assess the damage.

This character of evidence would only be competent in this case where the article lost or destroyed had no market value, and not then, unless that fact was affirmatively made to appear by evidence.

In the case at bar, there was no direct evidence that the property was either injured or lost. There was no evidence whatever descriptive of the property, no evidence tending to show its character or condition prior to the slide, no evidence from which any one could determine its value or lack of value, no evidence of its market value, no evidence that it had no market value, no evidence for which the property could be bought, no evidence for what it could be sold. The only thing done or attempted to be done was to file in evidence a bill of particulars; one of the complaints in the case, and then have the plaintiff himself testify that the articles were worth the amount at which they were listed in the bill of particulars. Clearly, this is not evidence of market value or of value at all.

The point that in the case such as the one under discussion, the market value of the property lost, together with interest thereon, is the measure of damages, and the law relating to the manner in which the market value must be arrived at, has often been passed upon by the courts.

In the case of *Watson et al. v. Longhram*, 38 S. E. page 82, the action was brought to recover damages for the loss of jewelry which the plaintiff alleged was stolen from her while the plaintiff was a guest of the hotel kept by the defendants. There was a verdict for the plaintiff, and a motion for a new trial having been denied, the defendants appealed. In passing upon the point under discussion, the court, in the course of the opinion, say:

“While in our opinion, the evidence demanded a finding that the defendants were liable, we do not think there was sufficient proof of the market value of the property lost to authorize the verdict rendered by the jury. The measure of plaintiff’s recovery was the market value of the property at the time it was lost, to which interest could have been added and included in the total sum of damages allowed. In *Oliquot v. Champagne*, 3 Wall.—114 18 L. Ed. 116, the trial judge charged the jury as follows. ‘The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale! The price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the regular course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard’. This charge was approved by the Supreme Court of the United States. The plaintiff in her petition set out a list of the goods alleged to have been lost, with the value of each. The verdict was the exact valuation of the jewels alleged in the petition. The only evidence as to the value of some of them was the price at which they had been purchased and some of the most valuable of them had been pur-



chased many years prior to the loss. While the cost of property may be considered, in connection with other facts, in determining its value, evidence of the cost; without which is not sufficient proof of its market value. In arriving at the amount of their verdict, the jury was clearly controlled by the price paid for some of these jewels, and not by their market value at the time when the loss occurred, and although the evidence on the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, which was \$1,600.00, the jury evidently estimated their value at the purchase price. As the evidence failed to definitely show the market value of the property at the time the loss occurred, a new trial must be granted."

In the case of *Carmen v. Montana Cent. Ry. Co.* (Mont.), 79 Pac. 690, the question now under discussion arose before the Supreme Court of Montana. This was an action for damages resulting from the wrongful killing and injuring of cattle. One of the questions before the court was whether there was evidence of damages to justify the verdict. In passing upon that question the Supreme Court of Montana said:

"But again, there is no competent testimony in the record as to the amount of damages sustained by plaintiff. Three animals were killed, and three injured, one of which afterward died. Plaintiff was the only witness upon the question of damages, and he failed to testify directly or clearly as to the amount of his damages. He was not asked as to the amount of his damages, but simply as to the value of the animals killed and injured. He does not give the damages he sustained to the cattle which were injured and not killed, and his testimony as to the value of



the cattle killed is also very indefinite, as shown by the following questions and answers:

‘Q. What would you place the value of those animals—taking all those that were injured or killed, what would you place the damage at—the value?

A. I wouldn’t have sold them for near the amount of money I put them in for.

Q. Well, \$240.00?

A. I wouldn’t take that for them no day in the week.

Q. Well, tell the jury what they were worth, so we can get the testimony.

A. They were worth to me probably more than they would be to most anyone else, because I had only a small herd, and I was trying to grade them up to get as good a herd as I could, but I put them in for \$250.

Q. Were they worth that to anybody?

A. Yes; that’s my opinion.’

Plaintiff’s damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages for the cattle injured could not be fixed by the same rule. We do not think this testimony was sufficient to go to the jury at all. The burden was upon plaintiff to show with reasonable certainty what loss he had sustained, and to show that amount as definitely as possible. *Mining Co. v. Freckleton* (Utah) 74 Pac. 652. It left the matter of the amount of damages sustained by plaintiff entirely to conjecture by the jury, and no verdict for the amount rendered could be sustained, which had been arrived at upon this testimony. The amount of damages which plaintiff is entitled to recover should not be left to conjecture.”

To the same effect are the following cases:

*Schwartz v. Schendel*, 53 N. W. Supplement 829;

Wagner v. Conway et al., 78 N. Y. Supp. 420;  
 Glass v. Hauser, 78 N. Y. Supp. 830;  
 Connolly v. Interurban St. Ry. Co., 86 N. Y.  
 Supp. 213;  
 Brooke v. Cunard S. S. Co. Lim., 93 N. Y. S.  
 369;  
 Lee et al. v. Callahan, 84 N. Y. Supp. 167;  
 Whitmark v. Lorton, 8 New York Supp. 480;  
 St. Louis Southwestern Ry. Co. v. Miss., 84  
 S. E. 281;  
 St. Louis I. M. & S. Ry. Co. v. Law, 57 S. W.  
 259;  
 McGillivray v. Hampton, 179 Pacific 733;  
 Johnson v. Levy (Cal.), 86 Pac. 810;  
 Hatch Bros. Co. v. Black et al. (No. 884), 165  
 Pac. Reporter page 520;  
 Warshawsky et al v. Dry Dock E. B. & B.  
 Co., 86 N. Y. Supp. 748;  
 Hays v. Windsor, 62 Pac. 395 (Cal.)

So, also, in the case of Boland v. Balaine, 266  
 Federal 22, it was held by this court that speculative  
 and visionary estimates of value did not constitute  
 a measure of basis for damages.

We respectfully submit that for the reasons stated  
 the judgment should be reversed.

Dated, Juneau, Alaska,  
 February 1, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,  
*Attorneys for the Plaintiff in Error.*



IN THE  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

ALASKA JUNEAU GOLD MINING  
COMPANY, a Corporation,  
*Plaintiff in Error,*

VS.

JOHN LARSEN,  
*Defendant in Error.*

---

**BRIEF OF DEFENDANT IN ERROR.**

---

HENRY RODEN,  
*Attorney for Defendant in Error.*

---

**FILED**

FEB 18 1922

**F. D. MONCKTON,**  
CLERK





No. 3815.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA JUNEAU GOLD MINING  
COMPANY, a Corporation,

*Plaintiff in Error,*

VS.

JOHN LARSEN,

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR.

### ARGUMENT.

The sole point raised by plaintiff in error in its brief is stated by it as follows: "*There was no evidence of injury or damage upon which the jury could base a verdict for damages.*"

The plaintiff in error admits (Printed Tr, p. 33) that "testimony was presented sufficient to sustain the verdict of the jury upon all matters submitted to them" save and except as to the amount of the damages sustained.

The question of the negligence of plaintiff in error is therefore fully settled, leaving for the consideration of this Court only the question as to whether or not there was testimony showing the extent of the injuries and the amount of damage done to the personal property of defendant in error by the negligence of plain-

tiff in error. As to the extent of the injuries, plaintiff in error, in its brief (p. 8) admits that the total destruction of the personal property is, at least, shown by inference drawn from competent testimony submitted upon the trial. The logical inference, drawn from competent evidence is as much competent legal proof of the fact inferred as though such fact were established by direct and positive evidence.

“When a material fact is not proved by direct testimony, it may be rationally inferred by the court or jury from the facts which have been so proved, even though the inference be not a necessary one. But an inference should not be adopted from a few of the facts proved, when it is absolutely inconsistent with, and repelled by, other equally well proved facts.”

17 Cyc. 820.

“Appropriate inferences from proved facts are not a low order of evidence sufficient even to overcome positive and direct testimony. Whether they should be permitted to overcome positive and direct testimony or not depends, in every instance, upon the relative strength of the one or the other.”

*Womack vs. Horseley*, 152 N. W. 65.

If opposing counsel are forced to admit, as they do in their brief, page 8, that the total destruction of the personal property may be ascertained by inference from competent testimony submitted, it may fairly be asked why the jury would not be justified in drawing the same conclusion that seems to force itself upon the attention of counsel. They use this language in their brief (p. 8):

"There was no *direct evidence* that any of the personal property was either injured or destroyed, unless this may be inferred from the fact that the house in which these articles were contained was destroyed by the slide. Even if it should be said that this were some evidence," etc.

Evidently they admit that it is "some evidence". The defendant in error testified that at the time of the slide he was in his house containing the personal property destroyed; that the house was carried down the hillside, which as alleged in the complaint and testified to in the course of the trial, was located on a hillside having a slope of 40 degrees from the horizontal; that this house was carried some fifty feet through and below a trestle work (Pr. Tr., p. 52), and when defendant in error found himself, his house had become "a pile of lumber on top of him."

In addition to this testimony, a bill of particulars, setting forth the items destroyed and their value, was introduced in evidence without any objection on the part of plaintiff in error. Upon this point the record reads (pp. 58 and 59):

"Mr. Roden: I would like to offer in evidence the bill of particulars that was filed, setting forth the property that was in the house.

"The Court: It will be received."

There is no objection on the part of plaintiff in error to its introduction.

Before this, when defendant in error began to enumerate the property in the house, and desired to use a list thereof to aid him, the following took place, as shown by the record (p. 44):

"Q. Have you a list of the stuff you had in the house? A. Yes.

"Q. You may use that list and tell us what was in there.

"The Court: If he has a list of it, just submit the list.

"Q. Have you a list there? A. Yes.

"The Court: Fix the valuation so the whole thing may go in." (Tr., p. 45.)

When the bill of particulars was then offered plaintiff in error stated:

"Mr. Hellenthal: It goes in evidence only to the extent of being an enumeration of the property. *The list also contains the valuation of each article—we do not object to that.*"

There was no objection of any kind when the bill of particulars was finally admitted in evidence as shown by the record (pp. 58 and 59).

This bill of particulars sets forth that it is

"a bill of particular items of personal property claimed by plaintiff in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant."

When this bill was admitted in evidence, without complaint or objection, we submit it became as much a part of the testimony and evidence in this cause as any other evidence admitted upon the trial, subject to cross-examination and attack by plaintiff in error and, if believed, decisive of the issue under consideration.

Plaintiff in error did not care to cross-examine upon this point and did not submit any evidence to contradict the evidence adduced.



Counsel for plaintiff in error complain about the evidence in support of the amount of damages sustained.

After it had been shown that the personal property was destroyed plaintiff below testified, after the trial court instructed him (to fix the valuation so the whole thing may go in), as to the total worth and value of the property. And this occurred after opposing counsel had stated:

“The list contains the valuation of each article—we do not object to that, of course (to its being admitted in evidence).”

The plaintiff in error, having no objection or complaint to urge against the evidence showing the worth and value of the destroyed property, cannot now be heard to complain. The worth and value, in the absence of any special showing, must have been that value to the recovery of which defendant in error was entitled under the law.

An examination of the record discloses that defendant in error was prepared and commenced to testify concerning the value of each article when the trial court suggested to put in the total amount and counsel expressly admitted that they had no objection thereto. Had plaintiff in error been dissatisfied with the value it might have cross-examined the witness with perfect propriety and elicited from him whatever further information it might have desired upon the value or worth of the destroyed property, its condition at the time of its destruction and such other information as it might have desired upon this question.

Says the Supreme Court of Missouri in *Seyfarth vs. Railway Co.*, 52 Mo. 450, involving the testimony of husband and wife as to the value of goods of a kindred character as in the case at bar:

“the subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached.”

“We think it was competent for the witness (the owner of the goods) to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods.”

*Western Home Insurance Co. vs. Richardson*,  
58 N. W. 600.

To the same effect are the following:

*Erickson vs. Drazkowski*, 54 N. W. 283,  
(Mich.);

*Tubbs vs. Garrison*, 25 N. W. 923 (Iowa);

*Railway Co. vs. Miller*, 162 S. W. 76;

*P. & N. T. Ry. Co. vs. Porter*, 156 S. W. 267;

*Fairfax vs. Railway*, 73 N. Y. 167, 29 Am.  
Rep. 119.

“The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony may be left to the jury;

and courts have usually made no objections to this policy."

Wigmore, vol. 1, par. 716.

In the case of *Pecos & N. T. Ry. Co.*, 171 S. W. 318, one of the owners of a part of the property testified as to the worth and value of a part of the personal property consisting of clothing, culinary articles, household paraphernalia, etc., stating the same item by item. Defendant objected to the witness, "stating what said items were worth, because this was not the proper method of proving the value of said articles, or the proper measure of damages for the loss thereof."

Says the Court, after quoting numerous authorities:

"We are unable to find any well considered case, as to the peculiar property involved here, that the owner of the goods, as a witness, is required to state the elements mentioned (cost of articles, period of their use and their condition at time of destruction) as a precedent qualification to testify to their value. The defendant produced no witness testifying to the value of the property lost; neither does the record show any cross-examination by defendants of the witnesses attempting to ascertain the cost of said articles, the extent of their use, the kind and character of the same, or as to the condition of the goods at any time, but rely solely upon the general objection. If the value in this instance is at all fanciful, or if the ingredients of cost, the extent of the use of the property, the condition of same at the time of their loss would have indicated to the jury that the value placed upon the same was improper, we believe, in this character of case, it is the duty of defendant to elicit it."

We respectfully submit that the authorities cited by plaintiff in error do not support its contention. Counsel quote at length from the decision in

*Watson et al. vs. Loughram*, 38 S. E. 82.

An examination this case discloses that counsel fail to quote the important part of the decision. The case was reversed upon an erroneous instruction concerning the measure of damages. We quote from the decision:

“The only evidence as to the value of some of the jewels was the price at which they had been purchased and some of the most valuable of them had been purchased many years prior to the loss. In arriving at their verdict the jury was clearly controlled by the price paid and not by their market value at the time when the loss occurred, and although the evidence of the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, the jury evidently estimated them at their purchase price. (Verdict being for the exact amount set up in the petition.) In view of this, it was error to charge the jury as follows:

“‘This is a question of the value of property, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours—you find your verdict according to what is proven to be the value of the property.’”

Upon this instruction the Appellate Court remarks:

“As we have seen with reference to some of the jewels lost the only value produced upon the stand was the valuation put upon them by the buyer and seller at the time of their purchase, and the jury, from the charge that they were ‘to

be governed by the value of that property as produced upon the stand' which, 'whether right or wrong, was no concern of theirs' might have understood that they were compelled to find the value of these jewels in accordance with that valuation."

A very different situation from the case at bar, where the Court instructed correctly upon the measure of damages and to the satisfaction of plaintiff in error. The opinion continues:

"As the defendants are clearly and justly liable to plaintiff for the market value of the property at the time of their loss, and the sole ground upon which a new trial is granted is that the evidence as to this market value is not sufficient to support the verdict rendered by the jury, a new trial is ordered upon this question alone, and that when the jury shall have found the market value of the property at the time of their loss, to which the jury may, if they see fit, add interest to the date of their finding, a judgment shall be entered for the plaintiff and against the defendant for the amount so found."

Counsel quote from

*Carmen vs. Montana Cent. Ry. Co.*, 79 Pac. 690.

From the quotation of plaintiff in error one might conclude that the case was reversed on account of lack of evidence to support the finding as to the amount of damages. Such is not the case. The Appellate Court found no evidence to sustain the allegations of the complaint as to the negligent conduct of the defendant railway company, on account of which the cattle



were claimed to have been killed and injured. As to the testimony to support the amount of damage done, it clearly appears that the value of the killed animals and the value of the injured ones were lumped in the sum of \$240.00. The evidence is:

“Q. What would you place the value of those animals—taking all those that were *injured or killed*, what would you place the damage at—the value?

“A. I would not have sold them for near the amount of money I put them in for.

“Q. Tell the jury what they were worth (the killed and injured animals).

“A. They were worth to me more than they would be to most anyone—I put them in for \$250.00.”

We find no fault with the Court when it says:

“The damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages, for the cattle injured, could not be fixed by the same rule.”

Certainly the value of the injured cattle was not the amount of damages sustained by plaintiff in that case.

In *Schwartz vs. Schendel*, 53 N. Y. S. 829, the only evidence introduced was to the effect that some damage had been done to certain goods by water overflowing and that the value of the goods damaged, at a rough estimate, was \$200.00. There was no testimony as to the nature and quantity of the goods nor as to the extent of the injuries thereto.

The remaining authorities quoted by plaintiff in error do not sustain its contention. An examination of these cases shows that the evidence of damages, given in them, was simply a statement as to the original cost of the damaged article, and not as to its value at the time the injuries were sustained. For instance:

In *Connolly vs. Interurban St. Ry.*, 86 N. Y. S. 213, the plaintiff testified that his damage to his clothing amounted to fifty dollars, because he paid fifty dollars for the clothes. There was no testimony as to its value at the time the damage was inflicted.

In *Glass vs. Hauser*, 78 N. Y. S. 830, the Court says:

"In one breath plaintiff testified to \$380.24, in the next to \$365.05, and in the next to \$363.05 as to the value of the property, upon which the justice gave a judgment in the sum of \$263.05."

In *Lee vs. Callahan*, 84 N. Y. S. 167, the plaintiff stated what he paid for the injured horse a year and a half before the accident, and that he did not know its market value.

In *Whitmark vs. Lorton*, 8 N. Y. S. 167, plaintiff testified what he had paid or agreed to pay for the property converted, and the court held that this testimony furnished no basis for the amount of damage he might be entitled to.

In *Brooks vs. Cunard S. S. Co.*, an action brought for the loss of baggage, the testimony of plaintiff was that he based his opinion of the value of the goods lost on their cost price, unaccompanied by further

testimony as to their cost price, except in the case of a very few articles.

In *McGillivray vs. Hampton*, 179 Pac. 733, quoted by counsel for plaintiff in error, the Court says:

"As to the finding of the Court that the hay destroyed had a market value of \$8.00 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value of baled hay at a greater sum than \$8.00 for baled hay; the cost of baling was proved to be \$1.75 per ton. The price of \$8.00 per ton for unbaled hay as fixed by the trial judge is not supported by a word of evidence."

In *Johnson vs. Levy*, 86 Pac. 810, the Court says:

"The examination of the plaintiff, both upon direct and cross, demonstrates that he had no personal knowledge upon which to base an estimate (for the damages sustained for the wrongful withholding of the possession of real estate). But even if this evidence be accorded the utmost weight, it is still insufficient. It clearly indicates that the estimated damages consisted of profits which might have accrued from the business which plaintiff might have conducted. Under no rule of law known to us can damages for the withholding of real property include speculative damages."

The last cast cited by plaintiff in error is *Hays vs. Windsor*, 62 Pac. 395, this being an action for replevin. Upon the question of damages, and upon which plaintiff in error seems to rely, the syllabus reads:

"Evidence that defendant, in an action of replevin, had lost much time and had been deprived of the replevied goods, and had been delayed in the payment of his debts, is not sufficient to show the damage resulting from the wrongful suing out of the writ."

We respectfully submit that the verdict and judgment of the lower court should be sustained.

Respectfully submitted,

HENRY RODEN,

Attorney for Defendant in Error.

## ADDITIONAL AUTHORITIES.

### *Inventory.*

"The inventory was offered and received in evidence. Witness testified that he made it with the cost price of each item which he said was the true value thereof. Held proper."

*Chicago & E. R. Co. vs. Ohio City L. Co.*, 214 Fed. 751 (8th Circt).

### *Market Value.*

Unless some other basis of value is fixed by the witness it will be presumed that the estimate is based upon the market value at the time the estimate is made.

"The witness testified that the horses were of such and such a value. We think this fairly implies the market value at the time. The witness fixed no other basis of knowledge and when one speaks generally of the value of chattels it means their value in the market. This is inferred unless a different basis of value is fixed by the witness."

*Coyle vs. Brown*, 41 Pac. 389.





No. 3815

IN THE <sup>cl</sup>

United States Circuit Court of Appeals

For the Ninth Circuit

---

ALASKA JUNEAU GOLD MINING COMPANY  
(a corporation),

*Plaintiff in Error,*

vs.

JOHN LARSON,

*Defendant in Error.*

---

PETITION FOR A REHEARING ON  
BEHALF OF PLAINTIFF IN ERROR.

---

HELLENTHAL & HELLENTHAL,

Juneau, Alaska,

*Attorneys for Plaintiff in Error  
and Petitioner.*

WM. E. COLBY,

Mills Building, San Francisco,

*Of Counsel.*

FILED

APR 26 1922

F. D. MONKTON,  
CLERK



No. 3815

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

ALASKA JUNEAU GOLD MINING COMPANY

(a corporation),

*Plaintiff in Error,*

VS.

JOHN LARSON,

*Defendant in Error.*

---

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

---

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Comes now the Alaska Juneau Gold Mining Company, the plaintiff in error herein, and petitions the court for a rehearing, and in that connection represents:

That the court in its opinion did not pass upon or go into the exact question intended to be urged by the plaintiff in error in its brief in

this—it was contended by the plaintiff in error that in a case of this kind the market value of the property destroyed plus interest is the measure of damages, and there was no evidence introduced in this case to show what the market value was; and, further, that if the case should be regarded as one in which the property had no market value, then it would be incumbent upon the defendant in error to establish by proof the exact character of the property alleged to have been destroyed with reference to whether it was old or new, in good repair or otherwise, what it had cost, what it would cost to replace it and other elements that might enter into the case.

The authorities cited by the court in support of its views undoubtedly sustain the proposition that the plaintiff being the owner of the goods destroyed had the right to testify as to their value notwithstanding the fact that he might not be qualified to so testify in the case where the property belonged to some one else, and the case of *Pecos & N. T. Ry. Company v. Grundy*, 171 Southwestern 516, seems to sustain the proposition that the owner of the property may testify as to its value without giving any further description of the property or going into the question of what the property is like.

With reference to the first proposition it would seem rather harsh to prevent the owner of property from testifying as to its value in cases where he would not be technically qualified to do so and the courts have quite generally held, it seems, that

he would not be denied this right; but, while an owner of property might have the right to testify to its value *from his view point*, and that is all he could do, his testimony will in no sense have a tendency to establish *the market value* of the property unless he testified further that he knew something about the market value, for what property might be worth to an owner, viewed through the eyes of an owner, at least would be a very different thing from what it would sell for in the market. In cases where such evidence as the mere valuation of property placed thereon by an owner not otherwise qualified to testify, is received we contend that the testimony should be accompanied by other testimony showing the character of the property, its age, state of repair and such other elements as bear upon its value, so that the jury would have something to go by. In other words, the plaintiff in a case of this character must ordinarily establish the market value of property, but if the property has no market value, then its value is its use value and that depends upon many things that go into its condition and state of repair. Market value is established by the testimony of experts; use value is established primarily by showing the character and condition of the property itself in order that the jury may place a value thereon and in proper cases this testimony may truly be supplemented by the testimony of witnesses as to what they estimate the property to be worth, but these estimates standing alone are not evidence of value when offered



independent of evidence touching the character and condition of the property itself.

To hold that evidence when given by the owner of property with reference to its value, in cases where such owner knew nothing of the market value, would be sufficient to go to the jury without other evidence of the condition of the property itself or other supporting testimony, would be to hold that in a case where the owner testified concerning the value of the property from his view point without reference to its market value, the defendant would not be able to offer any evidence at all, for it is only market value that can be proven by experts and it is only such witnesses that a defendant has a right to call. The plaintiff can testify notwithstanding the fact that he knows nothing about the market value for the sole reason that he is the owner of the property; and the other party not being the owner of the property has no legal right to offer such evidence. In a case, therefore, where the plaintiff, being the owner of the property, testifies that the property has a given value from his view point and does not base his testimony upon what such property is worth in the market, the defendant cannot meet this evidence by similar evidence for the reason that he is not the owner of the property and cannot speak concerning its value unless he is an expert, that is to say, unless he knows the market value, nor can the defendant produce witnesses to show what the market value of the property would be because if

the plaintiff does not produce any evidence with reference to the character of the property itself, no witness can testify concerning the market value of the property not knowing its character unless, indeed, the defendant should have been so fortunate as to have on hand a witness who might have seen the property prior to the time of its destruction, and a case of this kind would of course be a rare occurrence. The ruling of the Supreme Court of Texas in the case reported in 171 Southwestern 318, is based upon a proposition which we think this court would hesitate to endorse and that is that the measure of damages in such cases is not what the market value of the property is nor indeed what its use value is but what it was worth to the plaintiff prior to the time of its destruction. Under this rule it would be immaterial what a thing could be sold for on the market or to what use it could be put. The sole question to be inquired into would be what was it worth to the plaintiff, and its value to the plaintiff in many cases would be based largely upon matters that could not form a basis upon which either the court or jury could estimate the value. Heirlooms, keepsakes and other like articles of property would have a fanciful value to the plaintiff under this rule. The Texas court holds that because this is the proper measure of damages, it is entirely immaterial what the condition of the property is or the elements that enter into the calculation. Of course this is true for obvious reasons, the property may be a keepsake which has

no value except to its owner. Under this rule he has a right to testify that to him it is worth a given sum of money. There would, under those conditions, be no reason why he should describe the property because its market value or use value would not enter into the question of how much he could recover, nor would the production of this class of testimony assist the defendant in rebutting the testimony offered by the plaintiff in regard to the value because the value of the property which the plaintiff might under this rule recover, does not in any sense depend upon the property itself, its condition or state of repair, or anything of that kind. It simply depends upon the plaintiff's state of mind. If to him the property is worth a fixed sum, that settles it. And of course no witness can testify upon the question of how much store another person sets by a piece of property. He might testify as to its market value or its use value but the value that it has because of any particular association is a thing that can be determined only by the one person who knows the facts, whose state of mind is the governing factor. If this court would hesitate to adopt any such rule with reference to the measure of damages, it would seem to follow that it would not adopt the decision based upon this proposition and would require the plaintiff in such case either to prove the market value or the use value. That is to say, would either require the plaintiff to prove by those familiar with market conditions what the particular articles could be

bought or sold for on the market, or would call upon the plaintiff to produce evidence showing the character of the property itself, its condition, state of repair, etc., in order that the jury might reach some conclusion in regard to its use value.

While it is true that in this case the plaintiff was not cross examined with a view to establishing the character of the various articles of property enumerated in the list, it seems to us that this is clearly a part of the plaintiff's case, and the duty does not devolve upon the defendant to establish by cross examination those things which the law requires the plaintiff to establish. It was the duty of the plaintiff to show what this property consisted of and what its character and condition was. If he did not choose to produce evidence upon these points, the defendant was not obliged to do so. Moreover it cannot be assumed that the defendant would have been able to bring out these matters upon cross examination. The witness might or might not have been familiar with the matters sought to be established, presumably not, or the plaintiff would have inquired about them. To hold that the duty rests upon the defendant to cross examine and bring out these facts to which the jury are entitled, would be to cast upon the defendant in every case the duty of asking every possible question upon which a witness might be able to speak, for if he did not do this it could be assumed that the witness would have testified thus and so if interrogated upon cross-examination.



The Supreme Court of Texas also refers to the point that in that case the opposing party did not offer evidence upon the question of the value of the property destroyed. We do not know what the facts were in the Texas case, but in this case it would not have been possible under the present state of the record for the defendant to have offered any such testimony. It had before it a list of articles of property, including a range valued at a fixed sum and other articles enumerated in the same manner. Clearly it could not call witnesses and ask them whether a range was worth the sum stated or whether any other articles were worth the sum stated unless some one had first testified in regard to the character or condition of the property.

Because of the fact that this point was probably not made sufficiently clear in the opening brief and oral argument was not had we present this petition in order that the court may, if it is deemed just and proper, grant a rehearing upon this single point.

Dated, April 15, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,  
*Attorneys for Plaintiff in Error  
and Petitioner.*

WM. E. COLBY,  
*Of Counsel.*



## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, April 15, 1922.

WM. E. COLBY,  
*Of Counsel for Plaintiff in Error  
and Petitioner.*



5816

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

HARRY CRAINE,

Appellant,

vs.

PACIFIC STEAMSHIP COMPANY,  
a Corporation, and OLIVER  
CHILLED PLOW WORKS, a  
Corporation,

Appellee.

ABSTRACT OF RECORD

Upon Writ of Error to the United States District Court  
of the District of Oregon

FILED

JAN 3 - 1922

F. D. MONCKTON,  
CLERK

WM. P. LORD,

ARTHUR I. MOULTON,

Attorneys for Plaintiff in Error  
Portland, Oregon







## INDEX

	Page
Amended Libel .....	6
Assignment of Errors .....	18
Citation on Appeal .....	19
Demurrer .....	19
Judgment Order .....	14
Names and Addresses of Attorneys of Record .....	5
<i>Notice Application for Judgment</i> .....	<i>25</i>
Order Allowing Writ of Error and Fixing Bond .....	16
Order Sustaining Demurrer .....	13
<i>Order taking argument under advise -</i> .....	<i>25</i>
Petition for Writ of Error <i>ment</i> .....	15

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

HARRY CRAINE,

Appellant,

vs.

PACIFIC STEAMSHIP COMPANY,  
a Corporation, and OLIVER  
CHILLED PLOW WORKS, a  
Corporation,

Appellee.

ABSTRACT OF RECORD

Upon Writ of Error to the United States District Court  
of the District of Oregon

Names and Addresses of Attorneys of Record:

WM. P. LORD and ARTHUR I. MOULTON, 401-4 Board  
of Trade Building, Portland, Oregon,

Proctors for Libelant-Appellant

OGLESBY YOUNG, Chamber of Commerce Building,  
Portland, Oregon,

Proctor for Respondent-Appellee, Oliver  
Chilled Plow Works, a Corporation.

IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE  
NINTH CIRCUIT

Be it remembered, that on the 24th day of March, 1921, there was duly filed in the District Court of the United States for the District of Oregon, an

AMENDED COMPLAINT

in words and figures as follows, to-wit:

Now comes the plaintiff, with leave of Court first had and obtained, and brings this, his amended complaint, and for cause of action against the defendants, complains and alleges:

I

That the "City of Topeka" is an ocean going vessel, engaged in coast-wise trade, and on the 22nd day of September, 1920, was in the Port of Portland, berthed at Municipal Dock No. 2, taking on a cargo of miscellaneous freight, by the use of the ship's appliances commonly used in loading freight, and the services of the plaintiff and other longshoremen.

II

That the defendant Pacific Steamship Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Maine, and engaged in the business of shipping and ocean transportation, and

on the 22nd day of September, 1920, said defendant was the owner of the SS. "City of Topeka," hereinbefore mentioned, and on said 22nd day of September, 1920, said steamship was engaged in the services of the defendant, Pacific Steamship Company.

### III

That on or about the 22nd day of September, 1920, plaintiff was employed by the defendant, Pacific Steamship Company, to assist said defendant in loading and stowing freight from said wharf onto the deck and in the hold of said vessel.

### IV

That the defendant Oliver Chilled Plow Works is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, engaged in the manufacture and sale of plows and other farm machinery, and transacts business within the City of Portland, Oregon, where said defendant operates and maintains a warehouse from which it assembles parts of the farm machinery manufactured by said defendant and packs and ships the same to its customers.

### V

That on or about the said 22nd day of September, 1920, defendant Oliver Chilled Plow Works was shipping a certain potato digger manufactured by the said defendant to one of its customers by the defendant Pacific Steamship Company's said steamship "City of To-

peka," and had placed the said potato digger on the aforesaid wharf for shipment.

## VI

That the aforesaid potato digger was constructed with knives and other sharp parts, which were concealed from view and were not observable; that in shipping said potato digger said defendant had negligently and carelessly failed to remove said knives and sharp parts thereof or to box said knives and sharp parts in, or to cover or shield the same so that they would not have exposed persons who were handling the same and carrying said digger into the hold of the ship to the danger of cutting their hands while carrying the same into the hold of said ship, all of which was well known to defendant by properly inspecting the said digger before directing the plaintiff and other longshoremen to carry said digger aboard said steamship, as plaintiff was required to do, as it was defendant's duty so to do.

## VII

That it was the duty of the defendants to provide plaintiff with a safe place to work and to inform plaintiff of any hidden or latent dangers in connection with said work, but the said defendants, wholly disregarding their duty in the premises, and without any care or attention as to whether plaintiff would be injured thereby or not, negligently permitted said potato digger, hereinbefore described, to be loaded on said vessel by the plaintiff and other longshoremen carrying the same without



informing plaintiff that said knives and other sharp parts had not been covered, guarded or removed, or otherwise protected, as it was the duty of defendants to do, so as to prevent persons carrying said freight in the performance of their duties, from being cut by said knives and other sharp parts thereof, and by reason thereof, while plaintiff was engaged in carrying said potato digger across the floor of the hold of said vessel, as he was required to do, the fore and middle fingers of plaintiff's left hand became caught in the knives and other sharp parts of said potato digger, causing plaintiff to lose his said fingers, to his aggregate damage as hereinafter set forth, and all of which could have been prevented had the defendants exercised reasonable care in providing plaintiff with a safe place to work and informing plaintiff of hidden and concealed dangers, or by crating and packing said potato digger, or by guarding, covering or removing the knives and other sharp parts thereof.

### VIII

That the plaintiff is a resident of the State of Oregon and a resident of a different state from each of the defendants.

### IX

That the amount in controversy in this suit is in excess of the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

### X

That by reason of the negligence of defendant, as

hereinbefore described, plaintiff's left hand has become permanently impaired and mutilated and his earning capacity impaired, and he has suffered great physical pain and mental anguish, and loss of time to his damage in the sum of Ten Thousand (\$10,000.00) Dollars, and in addition thereto, plaintiff has incurred doctor and hospital bills in the sum of One Hundred Fifty (\$150.00) Dollars, in treating his said injuries, and will lose ten months' time from his work as a longshoreman, at which he earns \$200.00 per month, to his damage in the further sum of Two Thousand (\$2,000.00) Dollars.

Wherefore, plaintiff demands judgement against the defendants in the sum of Ten Thousand (\$10,000.00) Dollars, and the further sum of One Hundred Fifty (\$150.00) Dollars, and the further sum of Two Thousand (\$2,000.00) Dollars, and his costs and disbursements herein.

WM. P. LORD,  
Attorney for Plaintiff.

Endorsed:

U. S. District Court, District of Oregon.

Filed Mar. 24, 1921.

G. H. MARSH, Clerk.

(Verification omitted)

And thereafter, to-wit, on the 2nd day of April, 1921, there was duly filed in the District Court of the United States, in and for the District of Oregon, a

**DEMURRER**

in words and figures, as follows, to-wit:

(Title omitted)

Comes now the defendant Oliver Chilled Plow Works, a corporation, and demurs to the amended complaint herein upon the ground that the allegations thereof do not constitute a cause of action against said defendant.

## OGLESBY YOUNG

Attorney for Defendant Oliver Chilled Plow Works, a corporation.

United States of America, State of Oregon, County of Multnomah, ss.

I, Oglesby Young, attorney for defendant Oliver Chilled Plow Works, a corporation, hereby certify that the above demurrer is, in my opinion, well taken in point of law, and not made for the purpose of delay.

## OGLESBY YOUNG

### POINTS TO BE PRESENTED UPON THE ARGUMENT

#### I

The potato digger in the handling of which plaintiff was injured is not, as a matter of law, such a dangerous instrument as would make this defendant liable to plaintiff for injuries received in its handling, this defendant not being master of plaintiff.

#### II

It appears upon the face of the complaint that any

hidden or latent danger in the handling of the machine could have been discovered by an inspection thereof, and that it was the duty of plaintiff's master, the defendant Pacific Steamship Company, to make such inspection. (Par.VI).

### III

The alleged negligence of this defendant in delivering the machine with the latent dangers alleged does not appear in the complaint to be the proximate cause of the injury, the proximate cause of the injury being the command and direction given by the Steamship Company to the plaintiff, without warning him of the latent dangers of the machine. The Steamship Company, being chargeable with notice of the hidden dangers, and being master of the plaintiff, would have the duty of warning him, and such duty, as a matter of law, cannot be imposed upon this defendant. The allegation that it was the duty of both defendants to inform plaintiff of any latent dangers in connection with the work is a conclusion of law, and it cannot be considered in determining whether this defendant had such duty.

### IV

There is a misjoinder of parties defendant, in that it does not appear that the injury was caused by the concurrent negligence of the defendants, or by any joint act of the defendants, because, as a matter of law, it was not the duty of this defendant to provide plaintiff with a safe place to work, or to inform plaintiff of any

hidden danger in connection with the work which danger could have been ascertained by inspection.

Acceptance of service omitted.

Endorsed:

U. S. District Court.

District of Oregon,

Filed April 2, 1921.

*addenda p. 25.*

G. H. MARSH, Clerk.

*der taking argument under advisement*

And afterwards, to-wit, on Monday, the 2nd day of May, 1921, the same being the ..... Judicial day of the regular March term of said court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title omitted)

## ORDER SUSTAINING DEMURRER

This cause was heard by the Court upon the demurrer of Oliver Chilled Plow Works to the complaint herein and was argued by Wm. P. Lord, of counsel for plaintiff, and *George A. Pipes*, of counsel for defendant Oliver Chilled Plow Works.

It is ordered that said demurrer be and the same is hereby sustained.

Dated this 2nd day of May, 1921.

R. S. BEAN

District Judge.



Endorsed:

U. S. District Court,  
District of Oregon,  
Filed May 2, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the <sup>23</sup>~~2nd~~ day of May, 1921, the same being the ..... Judicial day of the regular March term of said court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

*Addenda. p. 25.* (Title omitted)  
*ice of Application for Judgment*  
JUDGMENT ORDER

This cause coming on, on motion of Oglesby Young, attorney for defendant Oliver Chilled Plow Works, a corporation, for an order dismissing the complaint as to said defendant and for judgment for its costs and disbursements incurred herein, and the Court having on the 2nd day of May, 1921, made an order sustaining the demurrer interposed to the complaint by said defendant; and no application having been made to the Court for further time in which to plead on the part of the plaintiff

It is ordered and adjudged that the complaint herein as to the defendant Oliver Chilled Plow Works be and the same hereby is dismissed.

It is further ordered that the said defendant have

judgment against plaintiff for its costs and disbursements incurred herein.

Dated this 2nd day of May, 1921.

R. S. BEAN

District Judge.

Endorsed:

U. S. District Court,  
District of Oregon.  
Filed May <sup>23</sup>2, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 2nd day of November, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a

### PETITION FOR WRIT OF ERROR

in words and figures as follows, to-wit:

(Title omitted)

The plaintiff says that on the 2nd day of May, 1921, this court entered judgment herein in favor of the defendant Oliver Chilled Plow Works and against the plaintiff, dismissing plaintiff's cause of suit against said defendant with costs and disbursements in said action, in which judgment and proceedings had prior and subsequent thereto in this cause certain errors were committed, to the prejudice of plaintiff, all of which will more fully appear in detail from the assignment of error, which is filed with this petition.

Wherefore, Plaintiff prays that a writ of error may issue in plaintiff's behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of error so complained of and that a transcript of the record and proceedings in this cause duly authenticated may be sent to said Circuit Court of Appeals.

WM. P. LORD,  
ARTHUR I. MOULTON,  
Attorneys for Plaintiff.

United States of America, District of Oregon, ss.

Due and legal service of the foregoing petition by copy admitted at Portland, Oregon, this 2nd day of November, 1921.

OGLESBY YOUNG

Attorney for defendant Oliver Chilled Plow Works.

And thereafter, to-wit on Tuesday, the 2nd day of November, 1921, the same being the . . . . . Judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title omitted)

ORDER ALLOWING WRIT OF ERROR

On this 2nd day of November, 1921, the above named

plaintiff, by his attorneys, Wm. P. Lord and Arthur I. Moulton, presented to the Court a petition praying for the allowance of a writ of error intended to be urged by plaintiff, and praying also that the transcript of record upon the judgment herein so rendered on the 2nd day of May, 1921, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, presenting therewith assignments of errors, and also praying that an order may be made fixing the amount of an undertaking on writ of error, and for such other and further proceedings as may appear proper in the premises.

On consideration thereof the Court does hereby allow the writ of error and fixes the amount of said bond in the sum of Three Hundred Fifty (\$350.00) Dollars, to be conditioned that the plaintiff will prosecute said writ of error to the effect that he will answer all costs and damages, if he fails to make good his plea.

Dated this 2nd day of November, 1921.

R. S. BEAN

Judge.

Endorsed:

Filed November 2, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 2nd day of November, 1921, there was duly filed in the District Court of the United States for the District of Oregon, an

## ASSIGNMENT OF ERRORS

in words and figures as follows, to-wit:

(Title omitted)

Plaintiff above named, in connection with his petition for writ of error in the above entitled action, suggests that there was error on the part of the District Court of the United States for the District of Oregon, in regard to the matters and things hereinafter set forth, and plaintiff makes assignment of errors, as follows:

1. The Court erred in sustaining the motion for default judgment filed by the Oliver Chilled Plow Works.

2. The Court erred in sustaining the demurrer of the Oliver Chilled Plow Works to plaintiff's amended complaint.

3. The Court erred in entering judgment in this cause in favor of the defendant Oliver Chilled Plow Works and against the plaintiff.

Each of the foregoing assignments of error is based upon the grounds and for the reason that the same is contrary to law and the decision of the Courts, and that plaintiff's amended complaint as to the Oliver Chilled Plow Works states a cause of action against said defendant.

Wherefore, plaintiff prays that the judgment of the District Court of the United States for the District



of Oregon in the above entitled cause may be reversed and that such directions may be given that full force and efficiency may inure to plaintiff by reason of the facts set out in his amended complaint filed in this cause.

WM. P. LORD,  
and  
ARTHUR I. MOULTON,  
Attorneys for Plaintiff.

United States of America, District of Oregon, ss.

Due and legal service of the foregoing assignment of errors hereby admitted this 2nd day of November, 1921.

OGLESBY YOUNG

Attorney for defendant Oliver Chilled Plow Works.  
Endorsed:

Filed November 2nd, 1921.

G. H. MARSH, Clerk.

And thereafter, to-wit, on the 2nd day of November, 1921, there was duly filed in the District Court of the United States for the District of Oregon a

### CITATION ON WRIT OF ERROR

in words and figures as follows, to-wit:

United States of America, District of Oregon, ss.

To Oliver Chilled Plow Works, a corporation,  
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Harry Craine is plaintiff and Pacific Steamship Company, a corporation and Oliver Chilled Plow Works, a corporation, are defendants and Harry Craine is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 2nd day of November, in the year of our Lord, one thousand, nine hundred and twenty-one.

R. S. BEAN

Judge.

Due and legal service hereby admitted this 2nd day of November, 1921.

OGLESBY YOUNG

Attorney for defendant.

Endorsed:

Filed November 21, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 2nd day of November,

1921, there was duly filed in the District Court of the United States for the District of Oregon, an

## UNDERTAKING ON WRIT OF ERROR

in words and figures as follows, to-wit:

(Title omitted)

Know all men by these presents, That I, Harry Craine, and Weibca C. Lord, a free holder within the Counties of Marion and Multnomah, Oregon, are held and firmly bound unto the above named defendant Oliver Chilled Plow Works, in the sum of Three Hundred Fifty (\$350.00) Dollars, for the payment whereof well and truly to be made, said plaintiff above named and said Weibca C. Lord, bind themselves, their heirs, executors, administrators and assigns, jointly and severally by these presents.

Whereas at a term of the District Court of the United States for the District of Oregon in an action pending in said Court between the above named plaintiff and defendant a judgment was rendered in favor of said defendant Oliver Chilled Plow Works, and the said plaintiff has obtained a writ of error and filed a copy thereof in the Clerk's office of said Court, to enforce judgment in said action a citation directed to the said defendant admonishing it to be and appear before the next session of the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the conditions of the above obliga-

tion are such that, if the plaintiff above named shall prosecute said writ of error to effect and answer all damages and costs if he fails to make good his appeal, then the obligation above is void, otherwise the same shall be and remain in full force and virtue.

In witness whereof, the parties have hereunto set their hands and notarial seals this 2nd day of November, 1921.

HARRY CRAINE

By WM. P. LORD, his attorney.

(SEAL)

WIEBCA C. LORD

(SEAL)

Executed in the Presence of Us:

R. M. DEERY,

WM. P. LORD

United States of America, District of Oregon, ss.

I, Weibca C. Lord, being first duly sworn, depose and say that I am the surety on the within undertaking and that I am not a counsellor or attorney at law, sheriff, clerk or other officer of any Court; that I am worth the sum of One Thousand (\$1,000.00) Dollars, over and above all property exempt from execution.

WEIBCA C. LORD

(SEAL)

Subscribed and sworn to before me this 2nd day of November, 1921.

WM. P. LORD,  
Notary Public for Oregon.

On good cause shown the foregoing undertaking is approved.

Dated this 2nd day of November, 1921.

R. S. BEAN  
District Judge.

Endorsed:

Filed November 2, 1921.

G. H. MARSH, Clerk.

And thereafter, to-wit, on the . . . . . day of December, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a

### STIPULATION

in words and figures as follows, to-wit:

(Title omitted)

It is hereby stipulated and agreed by and between the parties above named in the above entitled suit, through their respective attorneys, that the printed transcript of record in the above entitled cause, as printed by the complainant and tendered to the clerk for his certificate, is a true transcript of the record in the



cause, and that the clerk shall certify the said printed transcript in accordance with this stipulation without comparison with the original record.

Dated this ..... day of ....., 1921.

WM. P. LORD

Attorney for Plaintiff.

OGLESBY YOUNG

Attorney for defendant, Oliver Chilled Plow  
Works, a corporation.

Note: (Orders extending time not included in transcript).

United States of America, District of Oregon, ss.

I, G. H. Marsh, clerk of the District Court of the United States, District of Oregon, do hereby certify that the foregoing printed record was tendered to me as Clerk, for certification as a true transcript of the record in the case of Harry Craine vs. Pacific Steamship Company, a corporation, and Oliver Chilled Plow Works, a corporation, and I hereby certify that the foregoing printed Transcript of Record is in accordance with the stipulation of the parties herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, this 24th day of December, 1921.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

## ADDENDA

And afterwards, to-wit: On Monday, the 25th day of April 1921, the same being the.....Judicial day of the regular term of said Court; Present, the Honorable R. S. Bean, United States, District Judge, presiding. The following proceedings were had in said cause, to-wit:

(Title Omitted)

Now at this day, this cause comes on to be argued upon the demurrer of the Oliver Chilled Plow Works, to the complaint herein plaintiff appearing by Mr. Wm. P. Lord, of counsel, and defendant Oliver Chilled Plow Works appearing by Mr. Oglesby Young and Mr. George A. Pipes, of counsel, and the Court having heard arguments will advise thereof.

And thereafter, to-wit: On the 17th day of May, 1921 there was duly filed in the District Court of the United States in and for the District of Oregon, a notice in words and figures as follows, to-wit:

(Title Omitted)

To Harry Craine, the above named plaintiff and to Wm. P. Lord, your attorney:

You will please take notice that the above named defendant, Oliver Chilled Plow Works, will, on Monday the 23rd day of May, 1921, at the hour of 10 o'clock

A. M., or as soon thereafter as counsel can be heard, apply to the court for an order dismissing the complaint in the above entitled cause as to the said defendant Oliver Chilled Plow Works; and for judgment for costs and disbursements incurred by said defendant in this action; on the following grounds, to-wit:

That on the 2nd day of May, 1921, the Court made and entered an order in the above entitled cause sustaining a demurrer interposed to the complaint by said defendant and you have not further pleaded or appeared in said cause.

OGLESBY YOUNG

Attorney for defendant,  
Oliver Chilled Plow Works.

Acceptance of service admitted.

W. P. LORD.

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

HARRY CRAINE,  
Plaintiff in Error,

vs.

PACIFIC STEAMSHIP COMPANY,  
a Corporation, and OLIVER  
CHILLED PLOW WORKS, a  
Corporation,  
Defendant in Error.

---

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court

---

WM. P. LORD,

ARTHUR I. MOULTON,

Attorneys for Plaintiff in Error

---

FILED

FEB 6 - 1922

F. D. MONROE

CL





## SUBJECT INDEX

	Page
Points and Authorities .....	7
Statement of the Case.....	5
Assignment of Errors.....	8
Argument .....	9

## CASE INDEX

Bamfield vs. Goole and Sheffield Transfer Co., Ltd., 2 K. B. 94, 3 N. C. C. A. 248.....	7
2 Hutchinson on Carriers, Sec. 796-7.....	7
Farrant vs. Barnes, 11 C. B. (N. S.), 553 8 Jur., (N. S.) 868.....	7
Boston & Albany Car Co., vs. Shanly, 107 Mass., 568 .....	7
International Mercantile Marine Co., vs. Fels, 170 Fed. 275 .....	7
Pioneer S. S. Co., vs. McCann, 170 Fed. 873.....	8
Consolidation Coastwise Co., vs. Conley, 250 Fed., 679 .....	8
Middleton vs. Ross, 213 Federal, 6.....	8
Galvin vs. Brown & McCabe, 53 Oregon, 598, 101 Pacific 671 .....	9



United States  
Circuit Court of Appeals

For the Ninth Circuit

---

HARRY CRAINE,  
Plaintiff in Error,

vs.

PACIFIC STEAMSHIP COMPANY,  
a Corporation, and OLIVER  
CHILLED PLOW WORKS, a  
Corporation,  
Defendant in Error.

---

STATEMENT OF THE CASE

This case arises upon a writ of error to the District Court for the District of Oregon, bringing here for review the action of that court in sustaining the demurrer of the Oliver Chilled Plow Works, a corporation, to the complaint filed against it, and Pacific Steamship Company, a corporation, by Harry Craine. Craine was a stevedore employed by the steamship company to assist in storing cargo in the hold of the ship "City of Topeka." His work required him to remain at a point in the hold of the vessel and receive cargo passed to him by the ship's appliances, and stow it in the hold. The complaint alleges that the defendant in error, the plow company, as shipper, consigned to the "City of Topeka" a shipment

of potato diggers, and that it carelessly and negligently left on one of the potato diggers a sharp knife or blade, which in making such shipments would ordinarily have been removed or boxed in. The complaint also alleged as to the plow company that it carelessly and negligently failed to notify the steamship company or the steamship company's servants of the presence of this sharp blade, and that the plaintiff in error was required to carry the potato digger across the floor of the hold of the vessel, and that while so doing his left hand was caught on the knife and his fingers cut so badly that they required amputation, to his damage.

To this complaint, which appears in the abstract, the plow company interposed a demurrer setting forth that it proposed to contend upon the trial: first, that the potato digger was not an inherently dangerous instrument; second, that it appeared from the complaint that it was the duty of the steamship company to inspect the shipment; third, that it did not appear from the complaint that the negligence of the steamship company in making the shipment in its dangerous condition was the proximate cause of the injury; and, fourth, that there was a misjoinder of parties defendant in that it does not appear that the injury was caused by the concurrent negligence of the defendants, or by any joint act of the defendants.

Without written opinion, Mr. Justice Bean sustained the demurrer, and plaintiff in error declining to

plead further, the suit was dismissed as to the plow company.

## POINTS AND AUTHORITIES

### I.

A shipper owes the duty to a common carrier to whom it delivers goods for shipment, and likewise to the servants of the carrier, to exercise reasonable diligence to see that the goods delivered for shipment are in reasonably safe condition to be handled by the servants of the carrier, and are free from latent or hidden dangers of which it either has notice or can be advised by the exercise of reasonable diligence.

Bamfield vs. Goole and Sheffield Transfer Co.,  
Ltd., 2 K. B. 94, 3 N. C. C. A., 248.

2 Hutchinson on Carriers, Sec. 796-7.

Farrant vs. Barnes, 11 C. B. (N. S.) 553 8 Jur.  
(N. S.) 868.

Boston & Albany Car Co., vs. Shanly, 107  
Mass. 568.

International Mercantile Marine Co., vs. Fels,  
170 Fed. 275.

### II.

One who sets in motion a dangerous appliance is liable in damages to all who are injured by it when they are lawfully dealing with it in the manner in which it



could be expected to be dealt with, whether they are dealing with it as servants of him who sets it in motion, or at his invitation, or at the invitation of another who has the right to deal with it.

Pioneer S. S. Co., vs. McCann, 170 Fed. 873.

Consolidation Coastwise Co., vs. Conley, 250 Federal, 679.

Middleton vs. Ross, 213 Federal, 6.

### III.

The fact that the potato digger was a simple appliance would not take it out of the rule respecting dangerous devices, if by negligence of the plow company it was permitted to be in a dangerous condition, that is to say, in such a condition that a reasonably prudent person should have foreseen that it might inflict injury upon those lawfully coming in contact with it; and what was a dangerous condition was a question to be determined upon the trial by the jury.

Gekas vs. O.-W. R. & N. Co., 75 Ore., 243:  
146 Pac. 970.

### IV.

Where two persons are each guilty of a negligent act and each of the negligent acts is a part of the proximate cause of injury to a third person, the persons so guilty of negligence are joint tort feasons and may be sued

together, notwithstanding the two negligent acts may be different in nature or may be wholly disassociated one from the other. It is sufficient upon demurrer, where the complaint charges concurrent negligence if the jury may find that the negligence of either or both parties was part of the proximate cause of the injury.

Galvin vs. Brown & McCabe, 53 Oregon 598;  
101 Pacific 671.

### ASSIGNMENT OF ERRORS

Plaintiff above named, in connection with his petition for writ of error in the above entitled action, suggests that there was error on the part of the District Court of the United States for the District of Oregon, in regard to the matters and things hereinafter set forth, and plaintiff makes assignment of errors, as follows:

1. The Court erred in sustaining the motion for default filed by the Oliver Chilled Plow Works.

2. The Court erred in sustaining the demurrer of the Oliver Chilled Plow Works to plaintiff's amended complaint.

3. The Court erred in entering judgment in this cause in favor of the defendant Oliver Chilled Plow Works and against the plaintiff.

Each of the foregoing assignments of error is based upon the grounds and for the reason that the same is contrary to law and the decision of the Courts, and that

plaintiff's amended complaint as to the Oliver Chilled Plow Works states a cause of action against said defendant.

Wherefore, plaintiff prays that the judgment of the District Court of the United States for the District of Oregon in the above entitled cause may be reversed and that such directions may be given that full force and efficiency may inure to plaintiff by reason of the facts set out in his amended complaint filed in this cause.

### ARGUMENT

The ground of the court's action in sustaining the demurrer does not appear of record and we are therefore disposed to briefly present the case upon all of the grounds asserted in the demurrer.

The general rule of liability is very clearly stated and exhaustively discussed in the English case of *Bamfield vs. Goole*, etc. We are not disposed to burden the court with either a lengthy quotation from that case or a rehearsal of the reasons upon which it is founded. They sufficiently appear in the separate concurring opinions of the members of the court. While in these opinions there is expressed a divergence of views upon the question whether the shipper warrants the fitness of the goods offered to be handled by the carrier and his servants, all of the members of the court agree, and therein they are sustained by all of the cases discussed in the opinion, that it is a settled proposition at common law that the shipper is liable for negligence if he fails either to make

the shipment reasonably safe, or advise the carrier of its dangerous condition. He is held liable not only to the carrier, but likewise to the servants of the carrier. We are unable to find any intelligent dissent from this proposition. In the case of *International Mercantile Marine Co. vs. Fels*, *supra*, it was said, "that it was the duty of the respondents at common law to make such disclosures is unquestionable." We think it is settled beyond debate that at common law, the shipper is liable if he negligently turns over to the carrier articles which are in a dangerous condition and expose the servants of the carrier to injury, and which by reasonable inspection could have been ascertained to be in a dangerous condition, without warning the carrier of the dangerous condition of the shipment. That the servants of the carrier may invoke this liability is established in the English case cited, wherein damages were awarded to the wife of the carrier for injuries which she received; and by analogy the authorities herein cited on the subject of liability to invitees establish the proposition that the shipper is liable to all those persons whom it might reasonably foresee would be injured by coming in contact with the dangerous article. That the plaintiff was not the servant of the shipper, and that his master also owed him a duty in respect to inspection of the shipper would not relieve the shipper of the consequences of its negligence. One act of negligence never excuses another. If the shipper was negligent and therefore liable in damages, it can find no excuse in the fact that the carrier may also have been negligent. The only negligence which could operate to save the shipper harmless from



the consequences of its own act would be the negligence of the plaintiff himself. It is a settled proposition that even where the negligence of a fellow servant of the plaintiff concurs with the negligence of another to produce an injury this concurring negligence does not relieve the other.

Upon the other propositions made by the demurrer, very little authority has been cited, as it is believed that the propositions are fundamental. The contention that the negligence of the defendant was not the proximate cause of the injury because after the dangerous agency was set in motion by the shipper the carrier may also have been negligent in failing to inspect it before it reached the plaintiff, is utterly without foundation in reason or in authority. As has already been said, the negligence of the carrier in failing to apprise itself of the dangerous condition which resulted from the negligence of the shipper, and in failing to warn its servant of that dangerous condition, could not operate to relieve the shipper of liability for its negligent act in shipping the article in a dangerous condition. If it had warned the carrier of the danger incident to handling the article then it might have been said that it was free from negligence, but since it failed to do so, it was negligent, and its negligence is actionable.

The contention in respect to misjoinder of parties is fully disposed of by the Oregon case of *Galvin vs. Brown & McCabe*, herein cited. The injury in this case was produced by reason of the fact that this potato



digger was passed to Craine for handling with the knives still attached and not boxed in. This act resulted primarily from the negligence of the plow company in shipping it in that condition, and secondarily from the failure of the plow company and the steamship company or either of them to warn the stevedores of its condition. These acts of negligence concurred to produce the injury, and while it may be said that the two defendants did not act together and at the same time, it is unquestionably true that the negligence of each participated in bringing about the general result. It is true that the degree of care due from them is different, inasmuch as the carrier has the right, within reasonable bounds, to assume that simple articles, usually found in a safe condition, are in their usual condition. The shipper, on the other hand, as soon as it prepares an article for shipment, is chargeable with knowledge of its condition and the degree of care to be exacted from it is proportionately higher. In this case the shipper was negligent in leaving the blades on the digger in the first place.

The contention that the article being simple in its nature and ordinarily safe there can be no liability, is directly contrary to the established rule of authority. To begin with the case cannot by any possible theory fall within what is known as the "simple tool doctrine." That was contended for in the cited case of *Gekas vs. O.-W. R. & N. Co.* A potato digger is neither sufficiently simple nor sufficiently well-known that the Court can pass upon its capacity for doing injury, as a matter of law. In the second place, it is often true, and was true

in this case, that negligence can change a simple and safe tool or appliance to an exceedingly dangerous one. The potato digger was entirely safe with the knife removed or covered, but was a very potent agent of destruction if shipped with the knife attached and uncovered.

The complaint is not wanting in allegations of negligence, nor in the specification of the particular acts of negligence charged, and it is respectfully submitted that the demurrer as to the plow company should have been overruled and the case should have been permitted to proceed to trial as against the shipper.

Respectfully submitted,

WM. P. LORD,

ARTHUR I. MOULTON.

In the  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

HARRY CRAINE,  
*Appellant,*  
*vs.*

PACIFIC STEAMSHIP COMPANY, a Corporation, and  
OLIVER CHILLED PLOW WORKS, a Corporation,  
*Appellee.*

---

**Brief of Oliver Chilled Plow Works,  
Defendant in Error.**

---

*Upon Writ of Error to the United States District  
Court of the District of Oregon.*

---

OGLESBY YOUNG,  
GEORGE A. PIPES,  
*Attorneys for Oliver Chilled Plow Works,  
Defendant in Error.*

**FILED**

FEB 3 - 1922

**F. D. MONCKTON,  
CLERK.**



**In the**  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

HARRY CRAINE,  
*Appellant,*

*vs.*

PACIFIC STEAMSHIP COMPANY, a Corporation, and  
OLIVER CHILLED PLOW WORKS, a Corporation,  
*Appellee.*

---

**Brief of Oliver Chilled Plow Works,**  
**Defendant in Error.**

---

**STATEMENT**

The defendant in error, Oliver Chilled Plow Works, appearing separately, filed a demurrer to the amended complaint, which demurrer was sustained by the Court. On the failure of plaintiff to further plead, and without any application made therefor or leave given to so plead, the Court after due notice to plaintiff in error rendered judgment of dismissal in favor of this defendant in error. The sole question for review is the ruling of the Court in sustaining the demurrer. The two principal contentions of this defendant, urged at the argument, were that the complaint failed to show that the alleged acts of this defendant were in violation of any duty it owed to the plaintiff; and secondly, that this defendant's al-



leged acts were not the proximate cause of the injury. The Court sustained the demurrer on the first contention, but did not pass upon the last. In the brief we shall make both contentions.

## POINTS AND AUTHORITIES

### I.

A potato digger in the condition described in the complaint is not an article inherently or imminently dangerous so as to create in the shipper a liability to persons injured, independent of contract.

*S. P. Roddy v. Missouri R. Co.*, 104 Mo. 234;  
12 L. R. A. 746.

*Burke v. Sugar Company*, 11 Hun. 354.

*The Mary Stuart*, 5 Hughes, 312.

*Loop v. Litchfield*, 42 N. Y. 351.

*Zieman v. Kieckhefer Elevator Co.*, 90 Wis.  
497; 63 N. W. 1021.

*Hiezer v. Kingsland Mfg. Co.*, 110 Mo. 605; 15  
L. R. A. 821.

### II.

After the delivery of the article by the shipper to the common carrier, the failure of the common carrier to inspect the article and warn its servant of latent dangers is the proximate cause of the injury, and the shipper is not liable.

*Fowles v. Briggs*, (Mich.), 40 L. R. A. 528.

## ARGUMENT

Before there is a liability for a tort, there must be a breach of duty owed to the injured person by the one whose acts may have caused the injury. It is not sufficient in a case to show merely that the act of the defendant was the cause of plaintiff's injury, but defendant's act is not actionable unless it involved a violation of a duty the law imposes. Whether a duty has been violated depends to a large degree upon the relations of the parties to each other. The master owes a duty to a servant in the discharge of his work that he does not owe to a stranger.

In the present case the plaintiff was the servant of the Pacific Steamship Company, and not the servant of this defendant in error. The Steamship Company had the right to direct the plaintiff and did direct the plaintiff. This defendant in error did not have such right, nor did it assume such right. The Steamship Company was in control of the premises upon which the plaintiff was injured, and of the instrumentalities used in the work. This defendant in error was not. This defendant in error was not the master of plaintiff, and did not owe to him a master's duty. It owed the plaintiff the same duty it owed to a stranger, no greater and no less.

The appellant may seek to avoid the propositions above stated by invoking certain allegations of the complaint in an attempt to show that that there was some relation assumed by this defendant in error toward the plaintiff. It is now our purpose to antici-

pate the appellant to that extent, in order to show that there was no relation between them as shown by the complaint. This calls for a construction of the pleading.

In Paragraph VI of the amended complaint the dangerous condition of the digger is alleged, and then follows: "all of which was well known to *defendant* by properly inspecting the said digger before directing the plaintiff and other longshoremen to carry said digger aboard said steamship, as plaintiff was required to do, as it was *defendant's* duty so to do." The defendant referred to, it may be inferred, is the Steamship Company, but it cannot be inferred that this defendant in error is meant, because this defendant had nothing to do with loading the ship, and had no right or authority to command or give orders to plaintiff.

In Paragraph VII, it is alleged: "It was the duty of the *defendants* to provide plaintiff with a safe place to work, and to inform plaintiff of any hidden or latent dangers in connection with said work." That is a conclusion of law merely, and has no force whatever, unless the complaint alleges such relation between the parties as would create such duty. It was not the duty of this defendant, Oliver Chilled Plow Works, to provide plaintiff with a safe or any place to work, nor to inform him of hidden dangers, because the complaint does not allege that plaintiff was in the employ of defendant, but does affirmatively allege that plaintiff was in the employ of the Steamship Company. (Par. III of the complaint.) There

being no facts alleged to support the legal conclusion, as to this defendant's duty, the legal conclusion must be disregarded. This leaves the complaint presenting the single question whether this defendant, not being the master of plaintiff nor directing his work, violated any duty owed to the plaintiff in doing the acts charged against it in the complaint.

The law is so well settled it is no longer debatable that one person delivering an article to another is not liable to the servant of the recipient for injuries caused in the handling of the article, unless the article belongs to the class of goods which are imminently or inherently dangerous. If such goods are imminently dangerous, a liability is created in favor of anyone, even though a stranger, who may be injured from the article without proper warning from the shipper. This is known in the law as liability independent of contract. In the application of this rule the courts have universally confined imminently dangerous articles to poison, firearms and explosives. The article must be of such a character that an ordinary person could not know, or ascertain by ordinary prudence, the danger he would incur by coming in contact with the article, and of such a character, that imminent danger of an injury, to the person handling it would naturally result.

In *Loop v. Litchfield*, 42 N. Y. 357, the court defines imminently dangerous articles as follows:

“They are the instruments and articles in their nature calculated to do injury to mankind, and



are generally intended to accomplish that purpose; they are essentially and in their elements instruments of danger."

We contend, and the lower court so found, that the article described in the complaint does not come within the classification of *imminently* or *inherently* dangerous articles so as to impose a liability upon the consignor in favor of the servant of the carrier; that is to say, a liability independent of contract. The article is designated in the amended complaint as a potato digger. It is a plow especially constructed for digging potatoes. It is alleged that the blades were concealed from view and should have been removed or boxed in so as to protect persons in handling the article. From this description the Court is asked to adjudge the article of a class or kind so imminently dangerous that injury would naturally result to a person placed in the position of plaintiff. This defendant is in the business of delivering this kind of machinery, it can be inferred from the complaint, and it is not alleged that the plow was packed in any manner different from the usual way. It would seem that a longshoreman of reasonable prudence could handle a plow packed in the usual manner without injuring himself. But whether that is so or not, the proposition we are making is that the plaintiff has no cause of action against this defendant, Oliver Chilled Plow Works, because the digger was not imminently dangerous.

The Court must first decide, as a matter of law,



from the description of the article in the complaint, whether the liability is created independent of contract. We have cited in the Points and Authorities cases in which the courts have held articles not to be dangerous, and we are confident that a reading of the decisions cited will show that articles a great deal more dangerous than the one described in the complaint have been held not to come within the class. The Court will see that these articles had hidden defects, on account of which defects persons were seriously injured or killed. We mention a few of the articles. A car with defective brakes; a defective freight elevator; defective tackle used in loading a ship; a defective threshing machine; a negligently constructed fly wheel. In these cases it was conceded and admitted that the manufacturer or seller was negligent in delivering the article in the condition which it was in, but that such negligence did not give rise to cause of action in favor of a servant of the consignee or a stranger.

Since there was no privity of contract between the plaintiff and this defendant, and since there was no liability independent of contract, as shown by the above cases, it follows that the demurrer to the complaint was properly sustained.

#### NOT PROXIMATE CAUSE.

We now pass to our second proposition. In Paragraph VI of the amended complaint it is alleged, after setting out the alleged dangerous condition of the digger, "all of which was well known to *defendant*

by properly inspecting the said digger before directing the plaintiff and other longshoremen to carry said digger aboard said steamship, as plaintiff was required to do, as it was *defendant's* duty so to do." Since there were two defendants and the negligence was charged against the "defendant," without designating which defendant, it becomes necessary, by a construction of the pleading, to determine which defendant was meant. An ambiguous pleading is construed against the pleader. The allegation, therefore, should be construed to mean the defendant Steamship Company. This construction is more evident when we consider that plaintiff was the employee of the Steamship Company and engaged by that Company for doing the very work in which he was injured.

In Paragraph VII of the amended complaint it is alleged that the injury "could have been prevented had the *defendants* exercised reasonable care in providing plaintiff with a safe place to work, and informing plaintiff of hidden and concealed dangers, or by crating and packing said potato digger, or by guarding, covering or removing the knives and other sharp parts thereof." Since it was the legal duty of the Steamship Company, and not this defendant's, to provide plaintiff with a safe place to work and to inform plaintiff of hidden and concealed dangers, the allegation is a legal conclusion, and in so far as it affects this defendant must be disregarded.

Considering the above quoted allegations of Paragraphs VI and VII as properly construed, it appears

that the accident would not have happened if the Steamship Company, plaintiff's master, had performed its duty to the plaintiff, its servant. That is to say, if the Steamship Company had exercised reasonable care to ascertain the danger by inspection, and when so ascertained, to have warned the plaintiff. A master's duty to his servant is a primary one, and cannot be delegated nor cast upon others.

This alleged negligence of the Steamship Company is subsequent in time to the alleged negligence of this defendant. This defendant's activities had ceased when it delivered the digger at the dock. From that time the digger was within the possession and control of the Steamship Company, and the acts and omissions of the Steamship Company, charged against the Company, were committed after this defendant's duty had ceased. The acts or omissions, therefore, of the Steamship Company constituted a cause intervening between the acts of this defendant and the injury.

The case as thus made is brought squarely within the ruling made in *Fowles v. Briggs*, (Mich.), 40 L. R. A. 528. In that case the plaintiff's intestate was a brakeman employed by a railroad company. The defendants were lumber dealers. They loaded a flat car with lumber in their yards, and shipped it over the railroad company's lines. The flat car loaded by the defendants, the lumber dealers, was so negligently and carelessly loaded that the pile of lumber slipped and crushed the brakeman, plaintiff's intestate. The complaint charged the negligence of the defendants

to be: "First, that they carelessly and recklessly loaded said flat car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employee of said railroad company to couple it to another car, and that said danger was not apparent to deceased. Second, that it was the duty of said defendants not to ship maple lumber upon a flat car without having the lumber so fastened and staked as to hold it from shifting. Third, that a piece of timber or other material should have been placed crosswise upon the floor and near the ends of said flat car under the lumber, for the purpose of lifting the extreme ends of the lumber. Fourth, that the defendants loaded this lumber upon the deck of said car while the deck of said car was covered with ice and snow and sleet and in a slippery condition; and fifth, that the lumber should have been placed in a box car and not upon a flat car."

The cause was tried before a jury, but after the evidence was concluded the Court took the case from the jury, upon the ground that the defendants violated no duty they owed to the plaintiff's intestate. The Court took the case from the jury on two grounds, the one we have already argued, that the article delivered was not inherently dangerous, but also upon the other ground that the acts of the defendants were not the proximate cause of the injury, the proximate cause being the duty of the railroad



company to inspect the car and ascertain the danger and provide against it. The Court says:

“In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question, but before the car came to decedent it was the duty of the railroad company to provide for the inspection. It was the intervention of an independent human agency.”

Then follows a discussion, with citations, supporting the proposition.

We submit that the demurrer was properly sustained, and judgment rendered in favor of the defendant in error.

OGLESBY YOUNG,

GEORGE A. PIPES,

*Attorneys for Oliver Chilled Plow Works,  
Defendant in Error.*





8010

---

In the  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

HARRY CRAINE,  
*Appellant,*  
*v.*

PACIFIC STEAMSHIP COMPANY, a Corporation, and  
OLIVER CHILLED PLOW WORKS, a Corporation,  
*Appellees.*

---

**Supplemental Brief of Oliver Chilled Plow Works,  
Defendant in Error.**

---

*Upon Writ of Error to the United States District  
Court of the District of Oregon.*

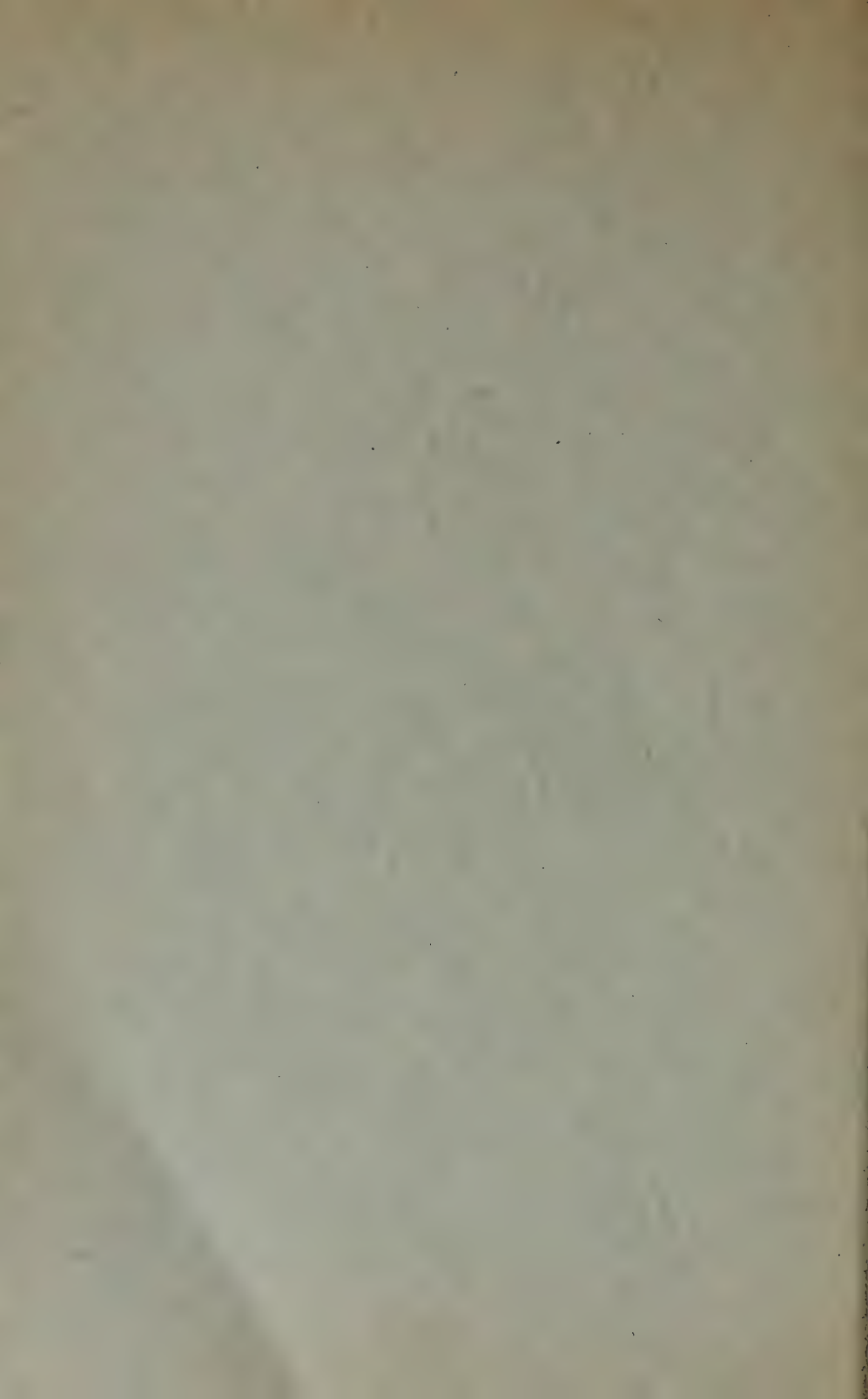
---

OGLESBY YOUNG,  
GEORGE A. PIPES,  
*Attorneys for Oliver Chilled Plow Works,  
Defendant in Error.*

**FILED**

FEB 20 1922

F. D. MONCKTON,  
CLERK



**In the**  
**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

HARRY CRAINE,  
*Plaintiff in Error,*

*v.*

OLIVER CHILLED PLOW WORKS, a Corporation,  
*Defendant in Error.*

---

**Supplemental Brief of Oliver Chilled Plow Works,**  
**Defendant in Error.**

---

Since the brief in behalf of the above named defendant in error was prepared and forwarded to the Clerk of this Court, the plaintiff in error served his printed brief upon attorneys for the defendant in error on the 4th day of February, 1922, to which the defendant in error begs leave to make brief reply.

At the outset, the plaintiff in error makes a misstatement of the case.

On page 1 and 2 of plaintiff's brief, the following statement is made: "The complaint alleges that the defendant in error, the Plow Company, as shippers, consigned to the 'City of Topeka' *a shipment of potato diggers*, and that it carelessly and negligently left on *one* of the potato diggers, a sharp knife or blade, which, in making such shipment, would ordinarily have been removed or boxed in."

A reference to the complaint, (Paragraph V thereof), discloses the variance between what the plaintiff claims in his brief and what he alleged in his complaint. In the complaint it is alleged (Paragraph V), "That on or about the 22nd day of September, 1920, defendant, Oliver Chilled Plow Works, was shipping *a certain potato digger* manufactured by the said defendant to one of its customers by the defendant PACIFIC STEAMSHIP COMPANY." The evident purpose of this statement in plaintiff's brief, is to have the Court draw an inference not warranted by any allegations in the complaint, that a number of potato diggers were consigned at the same time, all of which were properly crated or boxed, except one, which was left in a dangerous condition. Neither is there anything in the complaint tending to indicate that the potato digger, which is alleged to have caused the plaintiff's injury, was packed or crated other than in the ordinary way potato diggers are crated and shipped.

The contention is also made by plaintiff in error in his belated brief, that the duty is cast upon the shipper to notify the common carrier of the dangerous condition of goods, and his failure to do so, gives a cause of action in favor of the common carrier's servants. If that were true, which it is not, the complaint would not state a cause of action upon that theory, because the complaint does not allege a failure of the Plow Company to notify the Steamship Company of the alleged dangerous condition of the article shipped. The brief erroneously states that



the complaint has this allegation. In the statement of the case appears the following: "The complaint also alleged as to the Plow Company that it carelessly and negligently failed to notify the Steamship Company or the Steamship Company's servants of the presence of the alleged sharp blade." A reference to the complaint will disclose that there is no such allegation, but the complaint alleges merely that the Plow Company did not warn the plaintiff of the supposed danger. It is upon the supposition that the complaint charges a failure to warn the Steamship Company, that the appellant's argument is based. The following appears in the argument: "While in these opinions there is expressed a divergence of views upon the question whether the shipper warrants the fitness of the goods offered to be handled by the carrier and his servants, all of the members of the court agree, and therein they are sustained by all the cases discussed in the opinion, that it is a settled proposition at common law that the shipper is liable for negligence if he fails either to make the shipment reasonably safe, or advise the carrier of its dangerous condition." Later on in the argument occurs the following: "If it (The Plow Company) had warned the carrier of the danger incident to handling the article then it might have been said that it was free from negligence, but since it failed to do so, it was negligent, and its negligence is actionable."

The cases cited in appellant's brief in support of his contention, in so far as we have examined them, do not sustain appellant's contention that a cause of

action is stated in this complaint against the Plow Company. We have not examined the English case cited, so we do not know whether it is in point or not. If this case supports appellant's contention, its holding is certainly opposed to the rule adopted by the American courts. The cases cited in appellant's brief, which we have examined, fall within two classes,—cases where a servant is suing his master, or cases where the accident occurred through the unsafe condition of premises, which premises were under the control of the defendant, and the plaintiff was an invitee upon the premises. Under such circumstances the law creates a duty upon the part of the person in control of the premises to exercise ordinary care in keeping the premises safe, so as not to injure anyone entering them upon his invitation.

The case of *Pioneer Steamship Co. v. McCann*, 170 Fed. 873, cited in appellant's brief, is a case where an employee of a stevedore sued to recover for an injury caused by the unsafe condition of the vessel. The Plaintiff was injured on the vessel in the discharge of his work, and the negligence of the defendant was in leaving the vessel in a condition unsafe for unloading.

In *Middleton v. Ross*, 213 Fed. 6, the Court held that an invitee had a cause of action against one in control of premises where the injury occurred through the dangerous condition of the premises.

These cases do not dispute our proposition in the least. The Plow Company delivered the plow to the dock, and its duties immediately ceased, and it had

no more control over the premises or over the direction of the loading of the ship.

*Gekas v. O. W. R. & N. Co.*, 75 Or., 243, was an action by a servant against his master for failing to provide safe tools with which to work.

The case of *International Mercantile Co. v. Fels*, 170 Fed. 275, cited in appellant's brief, was an action by a carrier against a shipper for shipping explosives without informing the carrier of the nature of the cargo. The Court held, after a consideration of the evidence, that a disclosure as to the nature of the cargo was made by the shipper, and he was not liable. This case is not in point for three reasons: First, it was an action by the carrier against the shipper, and not by the carrier's servant; second, the nature of the article was an explosive, which, we have shown, comes within the class of imminently dangerous articles; and third, the bill of lading provided that the shipper should be liable for injuries caused by shipping dangerous goods without making full disclosure as to their nature.

None of the cases we have mentioned above dispute any of the propositions made in our brief. We respectfully submit that the Plow Company is not shown to be liable to the plaintiff by the allegations of the complaint.

Respectfully submitted,

OGLESBY YOUNG,

GEORGE A. PIPES,

*Attorneys for Oliver Chilled Plow Works,  
Defendant in Error.*



UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

9

CENTRAL CALIFORNIA CANNERIES COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

GRIFFIN & SKELLEY COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

J. C. AINSLEY PACKING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

ANDERSON-BARNGROVER MANUFACTURING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

GOLDEN GATE PACKING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

J. F. PYLE & SON, INC.,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

HUNT BROTHERS COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

SUNLIT FRUIT COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

TRANSCRIPT OF THE RECORD.

Upon Appeals from the Southern Division of the United States  
District Court for the Northern District of  
California, Second Division.

FILED

FEB 2 - 1922





**UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

---

CENTRAL CALIFORNIA CANNERIES COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

GRIFFIN & SKELLEY COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

J. C. AINSLEY PACKING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

ANDERSON-BARNGROVER MANUFACTURING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

GOLDEN GATE PACKING COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

J. F. PYLE & SON, INC.,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

HUNT BROTHERS COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

SUNLIT FRUIT COMPANY,  
vs.  
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING &  
MACHINERY COMPANY) and DUNKLEY COMPANY,  
Appellant,  
Appellees.

---

**TRANSCRIPT OF THE RECORD.**

---

Upon Appeals from the Southern Division of the United States  
District Court for the Northern District of  
California, Second Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of August M. Augensen .....	19
Affidavit of August M. Augensen (Supplemental). .....	24
Affidavit of Thomas Brazill .....	27
Affidavit of Katherine H. Breen .....	31
Affidavit of Mrs. George K. Brown .....	43
Affidavit of George K. Brown .....	34
Affidavit of George K. Brown (Supplemental). ..	39
Affidavit of Fred J. Buckley .....	47
Affidavit of Kemper B. Campbell .....	50
Affidavit of Stewart Campbell .....	76
Affidavit of Robert H. Clark .....	83
Affidavit of Lyman L. Crosthwaite (First) ...	87
Affidavit of Martin H. De Loof .....	93
Affidavit of Mrs. Charles De Pue .....	101
Affidavit of Charles De Pue .....	98
Affidavit of Clyde M. Funk .....	105
Affidavit of William A. Geiger .....	109
Affidavit of G. E. Grier .....	117
Affidavit of Mrs. George Harold .....	134
Affidavit of George Harold .....	130

Index.	Page
Affidavit of John Hetherington .....	137
Affidavit of John Hetherington (Supplemental). .....	142
Affidavit of Mary Z. Hinderliter .....	148
Affidavit of William A. Hinderliter .....	145
Affidavit of John Hodgson .....	152
Affidavit of Maud Howes .....	155
Affidavit of Jacob Hycoop .....	159
Affidavit of Dorothy Janashak .....	163
Affidavit of Mrs. Leander Kern .....	170
Affidavit of Leander Kern .....	166
Affidavit of Mrs. Ed. Krugler .....	175
Affidavit of William McEwing .....	182
Affidavit of Bert McFarland .....	186
Affidavit of Edwin B. Mapes .....	178
Affidavit of John C. Miller .....	190
Affidavit of Mrs. Eleanor Moore .....	193
Affidavit of George H. Myhan .....	196
Affidavit of Charles R. Newton .....	200
Affidavit of Robert Newton .....	203
Affidavit of Arthur W. Norton .....	206
Affidavit of Arthur W. Norton (Supplemental). .....	214
Affidavit of John F. Noud .....	217
Affidavit of Louis Payne .....	227
Affidavit of Nicholas Plating .....	220
Affidavit of Nicholas Plating (Supplemental). .....	224
Affidavit of Daniel P. Robinson .....	229
Affidavit of William C. Spencer .....	235
Affidavit of Mrs. Mary J. Stafford .....	238
Affidavit of Fred Stebler .....	242



Index.	Page
Affidavit of Harrie E. Stewart .....	246
Affidavit of William Tiece .....	249
Affidavit of Abe Vanderbrook.....	254
Affidavit of S. Van Ostrand.....	258
Affidavit of Mrs. Frank Webb .....	263
Affidavit of Mrs. Nellie Weed.....	266
Affidavit of William K. White.....	269
Assignments of Error (J. C. Ainsley Packing Company.).....	313
Assignments of Error (Anderson-Barngrover Manufacturing Company) .....	319
Assignments of Error (Central California Canneries Company).....	301
Assignments of Error (Golden Gate Packing Company) .....	325
Assignments of Error (Griffin & Skelley Com- pany).....	307
Assignments of Error (Hunt Brothers Com- pany).....	337
Assignments of Error (J. F. Pyle & Son, Inc.).	331
Assignments of Error (Sunlit Fruit Company)	343
Bond on Appeal (J. C. Ainsley Packing Com- pany).....	351
Bond on Appeal (Anderson-Barngrover Manu- facturing Company).....	353
Bond on Appeal (Central California Canneries Company) .....	346
Bond on Appeal (Golden Gate Packing Com- pany).....	356
Bond on Appeal (Griffin & Skelley Company).	348
Bond on Appeal (Hunt Brothers Company)..	361

iv *Central California Canneries Company et al.*

Index.	Page
Bond on Appeal (J. F. Pyle & Son, Inc.).....	358
Bond on Appeal (Sunlit Fruit Company).....	363
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.....	376
Citation on Appeal (J. C. Ainsley Packing Company).....	380
Citation on Appeal (Anderson-Barngrover Manufacturing Company).....	381
Citation on Appeal (Central California Can- neries Company).....	377
Citation on Appeal (Golden Gate Packing Company) .....	382
Citation on Appeal (Griffin & Skelley Com- pany).....	379
Citation on Appeal (Hunt Brothers Company)	385
Citation on Appeal (J. F. Pyle & Son, Inc.)..	383
Citation on Appeal (Sunlit Fruit Company)..	386

EXHIBITS:

Defendant's Exhibit No. 15—Photograph Showing Two Pasadena Washers and Water Supply Pipes.....	439
Defendant's Exhibit No. 16—Photograph Showing Pasadena Washers and Water Supply Pipe Lines.....	437
Dunkley's Exhibit No. 2—Photograph 1 of Second Machine.....	406
Dunkley's Exhibit No. 2—Photograph 2 of Second Machine.....	407
Dunkley's Exhibit No. 2—Photograph 3 of Second Machine.....	408

Index.

Page

EXHIBITS—Continued:

Exhibit "A"—Photograph Showing Mc-Dermett Machine.....	445
Exhibit "A-1"—Photograph Showing Mc-Dermett Machine.....	446
Exhibit "A-2"—Photograph Showing Mc-Dermett Machine.....	447
Exhibit "A-3"—Photograph Showing Mc-Dermett Machine.....	448
Exhibit "A-4"—Photograph Showing Mc-Dermett Machine.....	449
Exhibit "A" Attached to Affidavit of Thomas Brazill—Statement Dated January 30, 1904, Rendered Dunkley Company by Kalamazoo Foundry & Machine Co.....	399
Exhibit "A" Attached to Affidavit of Katherine H. Brun—Statement Dated January 14, 1904, Rendered Dunkley Co. by Clark Engine & Boiler Co.....	404
Exhibit "A" Attached to Affidavit of Fred J. Buckley—Statement Dated January 30, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co...	411
Exhibit "A" Attached to Affidavit of Kemper B. Campbell—Unsigned Letter Dated February 11, 1918, to W. R. McDermott.....	73
Exhibit "A" Attached to Affidavit of Stewart Campbell—Photograph.....	417
Exhibit "A" Attached to Affidavit of Robert H. Clark—Ledger Sheet.....	422

Index.	Page
EXHIBITS—Continued:	
Exhibit "A" Attached to Affidavit of Clyde M. Funk—Ledger Sheet.....	427
Exhibit "A" Attached to Affidavit of George Harold—Photograph.....	450
Exhibit "A" Attached to Affidavit of John Hetherington—Photograph.....	454
Exhibit "A" Attached to Supplemental Affidavit of John Hetherington—Pho- tograph.....	458
Exhibit "A" Attached to Affidavit of Mary Z. Hinderliter—Photograph.....	461
Exhibit "A" Attached to Affidavit of Maude Howes—Ledger Sheet.....	463
Exhibit "A" Attached to Affidavit of Bert McFarland—Diagram Second Floor Dunkley Factory 1904.....	466
Exhibit "A" Attached to Affidavit of Ar- thur W. Norton—Diagram Second Floor Dunkley Factory 1903.....	467
Exhibit "A" Attached to Supplemental Affidavit of Arthur W. Norton—Pho- tograph.....	470
Exhibit "A" Attached to Affidavit of Nicholas Plaster—Ledger Sheet.....	473
Exhibit "A" Attached to Supplemental Affidavit of Nicholas Plating—Sketch.	474
Exhibit "A" Attached to Affidavit of Daniel P. Robinson—Photograph....	476
Exhibit "A" Attached to Affidavit of Fred Stebler—Photograph.....	479



## Index.

## Page

## EXHIBITS—Continued:

Exhibit "A" Attached to Affidavit of Har- rie E. Stewart—Photograph.....	480
Exhibit "A" Attached to Affidavit of Will- iam Triage—Photograph.....	482
Exhibit "B" Attached to Affidavit of Thomas Brazill—Statement Dated February 29, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co. ....	400
Exhibit "B" Attached to Affidavit of Fred J. Buckley—Statement Dated Febru- ary 29, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co...	412
Exhibit "B" Attached to Affidavit of Kemper B. Campbell—Letter Dated March 3, 1918, W. R. McDermett to Kemper B. Campbell.....	73
Exhibit "B" Attached to Affidavit of Stewart Campbell—Photograph.....	418
Exhibit "B" Attached to Affidavit of Rob- ert H. Clark—Ledger Sheet.....	423
Exhibit "B" Attached to Affidavit of Clyde M. Funk—Ledger Sheet.....	428
Exhibit "B" Attached to Affidavit of George Harold—Photograph.....	451
Exhibit "B" Attached to Affidavit of John Hetherington—Photograph.....	455
Exhibit "B" Attached to Supplemental Affidavit of John Hetherington—Pho- tograph .....	459



Index.	Page
EXHIBITS—Continued:	
Exhibit "B" Attached to Affidavit of Mary Z. Hinderliter—Photograph.....	462
Exhibit "B" Attached to Affidavit of Maude Howes—Ledger Sheet.....	464
Exhibit "B" Attached to Affidavit of Arthur W. Norton—Photograph.....	468
Exhibit "B" Attached to Supplemental Affidavit of Arthur W. Norton—Pho- tograph.....	471
Exhibit "B" Attached to Supplemental Affidavit of Nicholas Plating—Sketch	475
Exhibit "B" Attached to Affidavit of Daniel P. Robinson—Photograph....	477
Exhibit "B" Attached to Affidavit of Will- iam Triage—Photograph.....	483
Exhibit "C" Attached to Affidavit of Thomas Brazill—Statement Dated March 9, 1904, Rendered Dunkley Co. by Kalamazee Foundry & Machine Co.	401
Exhibit "C" Attached to Affidavit of Fred J. Buckley—Statement Dated March 9, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co....	413
Exhibit "C" Attached to Affidavit of Kemper B. Campbell—Photograph...	416
Exhibit "C" Attached to Affidavit of Stew- art Campbell—Photograph.....	419
Exhibit "C" Attached to Affidavit of Clyde M. Funk—Statement of Clark Engine & Boiler Co.....	429

EXHIBITS—Continued:

Exhibit "C" Attached to Affidavit of George Harold—Photograph.....	452
Exhibit "C" Attached to Affidavit of John Hetherington—Photograph.....	456
Exhibit "C" Attached to Supplemental Affidavit of John Hetherington—Photograph.....	460
Exhibit "C" Attached to Affidavit of Maude Howes—Ledger Sheet.....	465
Exhibit "C" Attached to Affidavit of Arthur W. Norton—Diagram of Second Floor Dunkley Factory 1904.....	469
Exhibit "C" Attached to Supplemental Affidavit of Arthur W. Norton—Photograph.....	472
Exhibit "C" Attached to Affidavit of Daniel P. Robinson—Photograph....	478
Exhibit "C" Attached to Affidavit of William Tiece—Photograph.....	484
Exhibit "D" Attached to Affidavit of Thomas Brazill—Statement Dated March 31, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co. ....	402
Exhibit "D" Attached to Supplemental Affidavit of George K. Brown—Photograph .....	409
Exhibit "D" Attached to Affidavit of Fred J. Buckley—Statement Dated March	

Index.	Page
EXHIBITS—Continued:	
31, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co...	414
Exhibit "D" Attached to Affidavit of Stewart Campbell—Photograph .....	420
Exhibit "D" Attached to Affidavit of John Hetherington — Diagram of Second Floor Dunkley Factory 1904.....	457
Exhibit "E" Attached to Affidavit of Thomas Brazill — Statement Dated April 30, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co. ....	403
Exhibit "E" Attached to Supplemental Affidavit of George A. Brown—Photo- graph .....	410
Exhibit "E" Attached to Affidavit of Fred J. Buckley—Statement Dated April 30, 1904, Rendered Dunkley Co. by Kalamazoo Foundry & Machine Co....	415
Exhibit "E" Attached to Affidavit of Stewart Campbell—Photograph .....	421
Exhibit I Attached to Affidavit of Will- iam A. Geiger—Diagram.....	431
Exhibit II Attached to Affidavit of Will- iam A. Geiger—Photograph.....	432
Exhibit III Attached to Affidavit of Will- iam Geiger—Photograph .....	433
Exhibit IV Attached to Affidavit of Will- iam Geiger—Photographs.....	434

Index.	Page
<b>EXHIBITS—Continued:</b>	
Newspaper Clipping Attached to First Affidavit of Lyman L. Crosthwaite . . . .	424
Newspaper Clippings Attached to Second Affidavit of Lyman T. Crosthwaite . . . .	425
Plaintiff's Exhibit No. 5 Attached to Affidavit of G. E. Grier—Photograph of Pasadena Washer.....	436
Plaintiff's Exhibit "A" Attached to Affidavit of George K. Brown—Title Page of Volume II of Certified Copy of Printed Transcript of Record No. 2915 .....	405
Plaintiff's Exhibit "A" Attached to Affidavit of John Hetherington—Title Page of Volume II of Certified Copy of Printed Transcript of Record No. 2915 .....	453
Plaintiff's Exhibit "A" Attached to Affidavit of William Triece—Title Page of Volume II of Certified Copy of Printed Transcript of Record No. 2915 .....	481
Minutes of Court—April 5, 1916—Order Submitting Causes .....	2
Minutes of Court—August 22, 1921—Order Denying Motion to Reopen Decree and Granting Motion to Add New Party Plaintiff..	297
Motion—Application for a Request to the Circuit Court of Appeals to Recall Its Mandate and for a Rehearing.....	10



Index.	Page
Motion Made Pursuant to Permission Given in the Mandate of the U. S. Circuit Court of Appeals .....	2
Motion to Reopen Decrees in Equity.....	279
Names and Addresses of Attorneys of Record.	1
Notice of Motion .....	10
Order Allowing Appeal (J. C. Ainsley Pack- ing Company) .....	310
Order Allowing Appeal (Anderson-Barngrover Manufacturing Company) .....	316
Order Allowing Appeal (Central California Canneries Company).....	298
Order Allowing Appeal (Griffin & Skelley Company) .....	304
Order Allowing Appeal (Golden Gate Packing Company) .....	322
Order Allowing Appeal (Hunt Brothers Com- pany) .....	334
Order Allowing Appeal (J. F. Pyle & Son, Inc.) .....	328
Order Allowing Appeal (Sunlit Fruit Com- pany) .....	340
Order Denying Motion to Reopen Decree and Granting Motion to Add New Party Plain- tiff .....	297
Order Extending Time to and Including Janu- ary 10, 1922, to File Record and Docket Cause (J. C. Ainsley Packing Company)..	393
Order Extending Time to and Including Janu- ary 10, 1922, to File Record and Docket	



Index.	Page
Cause (Anderson-Barngrover Manufacturing Company) .....	394
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (Central California Canneries Company) .....	391
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (Golden Gate Packing Company) ..	395
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (Griffin & Skelley Company) .....	392
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (Hunt Brothers Company) .....	397
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (J. F. Pyle & Sons, Inc.) .....	396
Order Extending Time to and Including January 10, 1922, to File Record and Docket Cause (Sunlit Fruit Company) .....	398
Order Submitting Causes .....	2
Petition for Order Allowing Appeal (J. C. Ainsley Packing Company) .....	311
Petition for Order Allowing Appeal (Anderson-Barngrover Manufacturing Company) ..	317
Petition for Order Allowing Appeal (Central California Canneries Company) .....	299
Petition for Order Allowing Appeal (Griffin & Skelley Company) .....	305

Index.	Page
Petition for Order Allowing Appeal (Golden Gate Packing Company).....	323
Petition for Order Allowing Appeal (Hunt Brothers Company) .....	335
Petition for Order Allowing Appeal (J. F. Pyle & Son, Inc.).....	329
Petition for Order Allowing Appeal (Sunlit Fruit Company).....	341
Praeipie for Transcript of Record on Appeal.	366
Stipulation Respecting Form of Record on Appeal and Hearing of Appeal from That Certain Order of the Court Entered August 22, 1921, in Each of the Above Cases .....	369
Stipulation Re Record on Appeal.....	389
Stipulation Waiving Service of Copies of Papers to be Used on Motion .....	16
Supplemental Affidavit of August M. Augensen .....	24
Supplemental Affidavit of George K. Brown...	39
Supplemental Affidavit of John Hetherington.	142
Supplemental Affidavit of Arthur W. Norton..	214
Supplemental Affidavit of Nicholas Plating....	224

## **Names and Addresses of Attorneys of Record.**

FRED L. CHAPPELL, Esq., Kalamazoo, Michigan,  
and W. A. RICHARDSON, Esq., 68 Post St.,  
San Francisco, Calif.,

Attorneys for Plaintiffs.

KEMPER B. CAMPBELL, Esq., California Bldg.,  
Los Angeles, Calif.; FREDERICK S. LYON,  
Esq., Stock Exchange Bldg., Los Angeles, Calif.;  
WILLIAM J. CARR, Esq., (Address unknown),  
and FRANCIS J. HENEY, Esq. (Address un-  
known),

Attorneys for Defendants.

---

At a stated term, to wit, the March term, A. D. 1916,  
of the District Court of the United States of  
America, in and for the Northern District of  
California, Second Division, held at the court-  
room in the City and County of San Francisco,  
on Wednesday, the 5th day of April, in the year  
of our Lord one thousand nine hundred and six-  
teen—Present: The Honorable WILLIAM C.  
VAN FLEET, District Judge.

No. 201—Dunkley Company vs. Central California  
Canneries Co.

No. 202—Dunkley Company vs. Griffin & Skelley  
Co.

No. 205—Dunkley Company vs. J. C. Ainsley Pack-  
ing Co.

No. 206—Dunkley Company vs. Anderson-Barngrover  
Mnfg. Co.

2 *Central California Canneries Company et al.*

No. 209—Dunkley Company vs. Golden Gate Packing Co.

No. 210—Dunkley Company vs. J. F. Pyle & Son, Inc.

No. 211—Dunkley Company vs. Hunt Bros. Co.

No. 212—Dunkley Company vs. Sunlit Fruit Co.

**Minutes of Court—April 5, 1916—Order Submitting Causes.**

Counsel being present as heretofore the trial was resumed. Stewart L. Campbell was recalled and William Brunner was sworn and testified on behalf of defendants. T. B. Dawson was sworn and testified on behalf of plaintiff and E. B. Mapes was sworn and testified on behalf of defendants. Plaintiff introduced and filed its exhibits marked "12" and defendants introduced and filed their exhibit marked "BB". Both sides rested and the evidence being closed counsel for the respective parties made their arguments to the Court and the suits were submitted; plaintiff to have ten days to file its brief and defendants ten days thereafter to reply. [1\*]

---

(Title of Court and Causes.)

**Motion Made Pursuant to Permission Given in the Mandate of the U. S. Circuit Court of Appeals.**

Plaintiff shows that the mandate of the Circuit Court of Appeals herein was "directed to issue without prejudice to the right of the plaintiffs appellees herein to apply to the District Court for leave to make the

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

Dunkley Company or such other corporation or persons as plaintiffs appellees may contend is or are proper or necessary party plaintiffs to the action."

Plaintiff shows that the statement of the Court of Appeals was brought forth because of a motion filed by the defendants-appellants in the United States Circuit Court of Appeals for "orders vacating decree affirming decrees of District Court, etc.", based on a certain affidavit and showing, copy of which will be produced in court.

Plaintiff shows that, according to the documents thus adduced and offered by defendant, the name of the Dunkley Company, plaintiff herein, has been changed to Michigan Canning & Machinery Company, as appears at printed pages 54-55 of said motion of defendants-appellants, the change of name having been consummated January 27, 1916. That a new Dunkley Company was incorporated and such incorporation completely consummated on January 27, 1916, under the name of Dunkley Company, as appears at printed pages 55-61 of the printed motion of defendants. That after such incorporation, namely, on the 25th day of July, 1916, the Michigan Canning & Machinery Company assigned to the new Dunkley Company the United States Letters Patent No. 1,104,175 dated July 21, 1914, which assignment did not include the right of action in the [2] present suits and did not include the right to recover for past royalties or damages.

Plaintiff further shows that the incorporation of the new Dunkley Company and the assignment of the patent was done to put in legal form and accomplish



the reorganization of the plaintiff company with increased capital stock, as fully appears in the depositions of Henry W. Hardy, William F. Burrows and Henry Veeder, filed before the master herein, to which a reference is hereby made for greater certainty; and that there has been really no change of parties in interest and persons in control of the said patent herein suit.

Plaintiff further shows that to complete the reorganization and place the full title in the new Dunkley Company, on the 9th day of July, 1918, it supplemented the assignment referred to above by an assignment of the right to recover for past profits and damages, and the right to conduct these suits in the name of the plaintiff to recover all profits and damages herein, copy of which assignment is hereto attached.

Wherefore, plaintiff prays that the said new Dunkley Company may be made party plaintiff herein, as it is the chief party in interest and is this plaintiff after reincorporation with increased capital stock.

FRED L. CHAPPELL and  
W. A. RICHARDSON,

Counsel for Plaintiff.

The new Dunkley Company above referred to hereby prays that it may be made a party plaintiff herein, and that it may be substituted in the place of the Dunkley Company herein, having acquired the rights thereof by proper legal assignments and being the said company after the reincorporation proceedings referred to above.

FRED L. CHAPPELL and  
W. A. RICHARDSON,

Counsel for the new Dunkley Company. [3]

ASSIGNMENT.

WHEREAS, Michigan Canning & Machinery Company (formerly named Dunkley Company) of Kalamazoo, Michigan, a corporation, duly incorporated and existing under the laws of the State of Michigan, did obtain letters patent of the United States for an improvement in machines for Peeling Peaches and Other Fruit, which letters patent are No. 1104175 and bear date the 21st day of July, 1914;

AND WHEREAS, the said Michigan Canning & Machinery Company did heretofore, to wit, on the 25th day of July, 1916, assign and transfer unto the Dunkley Company, a corporation, duly incorporated and existing under the laws of the State of Michigan, its right, title and interest in and to the said improvement in machines for Peeling Peaches and Other Fruit, and in and to the letters patent therefor aforesaid;

AND WHEREAS, said Michigan Canning & Machinery Company is desirous of making a further and more complete assignment to the said Dunkley Company of all of its rights in and to the said improvement and the letters patent therefor, including any and all rights it may have to recover past profits and damages for all past infringements of said letters patent, and the right to maintain a suit in its name for or on account of any act, matter or thing growing out of the said letters patent, or any alleged infringement thereof, in any court or courts whatsoever;

AND WHEREAS, the Dunkley Company, a corporation, duly incorporated and existing under the laws of the State of Michigan, is desirous of acquiring the entire interest in the same;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, BE IT KNOWN, that for and in consideration of the sum of Ten (\$10.00) Dollars, and other good and valuable consideration, to it in hand paid, the receipt of which is hereby acknowledged, the said Michigan Canning & Machinery Company has sold, assigned and transferred unto [4] the said Dunkley Company the whole right, title and interest in and to the said improvement in machines for Peeling Peaches and Other Fruit, and in and to the letters patent therefor aforesaid; together with the right to sue for, take, receive and recover any and all past profits and damages for all past infringements of said patent, and especially for all such infringements mentioned or referred to or alleged to exist or found to have existed or to exist in that certain suit tried in the District Court of the United States, for the Second Division of the Southern Division of the Northern District of California, entitled "Dunkley Company vs. Central California Canneries Company", and of all the suits filed in the said District Court of the United States, for the Second Division of the Southern Division of the Northern District of California, which were subsequently consolidated with the above mentioned suit and tried together therewith, particularly the suits of said Dunkley Company against the Griffin & Skelley Company, J. C. Ainsley Packing Company, and the Anderson Barngrover Manufacturing Company, J. F. Pyle & Son, Incorporated, the Hunt Brothers Company, and the Sunlit Fruit Company, a corporation, all of which suits

were consolidated and tried together by the said District Court of the United States, for the Second Division of the Southern Division of the Northern District of California, resulting in a judgment in favor of plaintiff in each and all of said suits, which judgment was subsequently affirmed by the Circuit Court of Appeals for the Ninth Circuit, being Case No. 2915 in the record of said Circuit Court of Appeals, and entitled therein "Central California Canneries Company, et al., vs. Dunkley Company"; together also with the right to sue for, receive, collect, have and recover all past profits and damages for all past infringements of the said letters patent, and more particularly also for all such alleged infringements alleged to exist in that certain suit now pending in the District Court [5] of the United States, for the Southern District of California, Southern Division, being No. C-8 in Equity in the Records of the Clerk's Office of said Court, and entitled Dunkley Company and Michigan Canning & Machinery Company, Plaintiffs, vs. Pasadena Canning Company and George E. Grier, Defendants"; together also with the right to sue for, collect, have, receive and recover all such past profits and damages for any and all such past infringements on the part of any person or persons or corporations, firms, associations or co-partnerships, wheresoever the same may be and in whatsoever court actions for such infringements are or may be pending; together also with the right to maintain each and all and every one of the suits herein mentioned and any and all suits in whatsoever jurisdictions the same may be now pending, and to make and take any and all



action of any nature whatsoever that it may deem proper in each or all or any of said suits, and to prosecute the same, or any of them, to final judgment on appeal, or otherwise, in the name of this assignor, but nevertheless for the use and benefit of said Dunkley Company; the same to be held and enjoyed by the said Dunkley Company for its own use and benefit and for the use and benefit of its legal successors and assigns to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made.

IN WITNESS WHEREOF, the said Michigan Canning & Machinery Company has caused this instrument to be executed in its corporate name and in its behalf by its president, and its corporate seal affixed, and the same to be attested by the signature of its secretary, this 9th day of July, 1918.

MICHIGAN CANNING & MACHINERY  
COMPANY,

By PHILIP LARMON,  
President.

Attest: S. J. DUNKLEY,  
Secretary. [6]

State of California,  
County of San Francisco,—ss.

On this 9th day of July, 1918, before me, Nettie Hamilton, a Notary Public in and for said County, personally appeared Philip Larmon, known to me to be the president and S. J. Dunkley, known to me to be the secretary of the Michigan Canning & Machinery Company, the corporation that executed the within



and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal, the day and year in this certificate first above written.

NETTIE HAMILTON,

Notary Public in and for the City and County of  
San Francisco, State of California.

---

(Title of Court and Causes.)

To William K. White, Solicitor for Defendants,  
Crocker Bldg., San Francisco, Calif.

Please take notice that on Monday, August 19, 1918, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall present to the Court the motion, copy of which is hereto attached.

FRED L. CHAPPELL and

W. A. RICHARDSON,

Counsel for Plaintiff.

[Endorsed]: Filed Aug. 13, 1918. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Causes.)

**Notice of Motion.**

APPLICATION FOR A REQUEST TO THE  
CIRCUIT COURT OF APPEALS TO RE-  
CALL ITS MANDATE AND FOR A RE-  
HEARING.

To Dunkley Company, Plaintiff, and to Fred L.  
Chappell and W. A. Richardson, Its Solicitors  
and Counsel, No. 602 Foxcroft Building, San  
Francisco, California:

PLEASE TAKE NOTICE that on Monday, No-  
vember 11, 1918, at 10 o'clock A. M., or as soon  
thereafter as counsel can be heard, in the courtroom  
of the above-entitled Court in the United States Post  
Office and Court House Building in the City and  
County of San Francisco, State of California, the  
above-named defendants will present to the Court the  
motion, copy of which is hereto attached.

KEMPER B. CAMPBELL,

F. S. LYON,

WM. K. WHITE,

Solicitors and Counsel for Defendants. [8]

---

(Title of Court and Causes.)

**Motion—Application for a Request to the Circuit  
Court of Appeals to Recall Its Mandate  
and for a Rehearing.**

Come now the defendants in the above-entitled

causes and move the Court for the following order and decree, and such other relief as to this Honorable Court may appear proper and just in the premises, to wit:

An order and decree requesting the United States Circuit Court of Appeals for the Ninth Circuit to make an order permitting this Honorable Court to open, vacate and set aside the writ of injunction and every order, judgment and decree made in each of the above-entitled causes, and all proceedings therein, pursuant to and in compliance with the mandate of said Circuit Court of Appeals issued in each of said causes on the 20th day of May, 1918, and filed and spread upon the minutes of this Court on the 22nd day of May, 1918; and further requesting said Court of Appeals to recall, vacate and set aside said mandate, and to return the record in each of the above entitled causes to this Honorable Court for the purpose of enabling this Court to vacate and set aside the writ of injunction and every order, judgment and decree of this Honorable Court made and entered by it in each of the above entitled causes, and all proceedings therein pursuant to and in compliance with said mandate; and to reopen the trial and hearing of each of said causes, and to permit the defendants herein to amend their respective answers so as to plead the newly discovered defenses shown by the affidavits and documents on which this motion is based, and to receive in the [9] trial and hearing of each of said causes so reopened newly discovered, additional and further evidence bearing on the validity of the claims of the United States Letters Patent No. 1,104,175;

and on the question of alleged infringement of said letters patent by the above-named defendants; and to make a new and different order, judgment and decree in each of said causes, if such new evidence so received warrants such action.

### GROUND S OF MOTION.

Said motion will be based upon the following grounds, to wit:

(1) That subsequent to the issuance of said mandate a trial and hearing of another suit entitled Dunkley Company (a corporation) and Michigan Canning & Machinery Company (a corporation) Plaintiffs, vs. Pasadena Canning Company and George E. Grier, Defendants, was had in the United States District Court, Southern District of California, Southern Division. That said trial commenced on the 21st day of May, 1918, and said cause was submitted for decision on the 6th day of July, 1918, and a decree was entered therein on the 4th day of September, 1918. That said suit was an action brought by plaintiffs for the infringement of United States Letters Patent No. 1,104,175, being the Letters Patent sued on herein.

That the plaintiff herein was also plaintiff in said other suit, and after a change of its corporate name was designated therein as said Michigan Canning & Machinery Company (a corporation).

That in said suit of Dunkley Company (a corporation) and Michigan Canning & Machinery Company (a corporation), Plaintiffs, vs. Pasadena Canning Company and George E. Grier, Defendants, newly discovered, further and additional evidence was

introduced and admitted which was not introduced in the trial and hearing of the above entitled causes before this Honorable Court. [10]

That in said suit of Dunkley Company et al. vs. Pasadena Canning Company et al., said United States District Court in and for the Southern District of California, Southern Division, Judge Oscar A. Trippett presiding, did, on the 19th day of August, 1918, render its decision in which said Court determined and declared that the United States Letters Patent No. 1,104,175, being the Letters Patent sued on herein, were null and void, and the decree of said Court in said suit of Dunkley Company et al. vs. Pasadena Canning Company et al., dismissing the bill of complaints therein, was duly made and entered on the 4th day of September, 1918.

(2) That since the hearing of the above entitled causes by this Honorable Court new, further and additional evidence relevant and material to the issues in each of said above-entitled causes, and which evidence is not merely cumulative, has been discovered; that defendants in preparation for the trial of the above entitled causes used and employed due and reasonable diligence to discover and produce all evidence relevant and material to the issues therein, and that notwithstanding the use and employment of said due and reasonable diligence by defendants herein said new, further and additional evidence was not and could not, with due and reasonable diligence, have been discovered by defendants prior to the trial of said case of Dunkley Company et al. vs. Pasadena Canning Company et al.



(3) That said United States Letters Patent No. 1,104,175, being the Letters Patent sued on herein, and which have been held to be valid by this Honorable Court, have been held invalid by another United States District Court in this Circuit, resulting in a conflict of judicial decisions which will cause commercial confusion and impose upon defendants herein inequitable burdens rendering difficult, if not impossible, business competition with [11] others in the same field.

(4) That the presentation of said new, further and additional evidence will produce a record so materially different from that upon which this Honorable Court rendered its decision and decree herein on the 8th day of December, 1916, that the same would result in a different decision by this Court, and that said United States Letters Patent 1,104,175 would be held by this Honorable Court to be null and void.

(5) That at the time of the trial of the above-entitled causes the plaintiff had no beneficial or equitable interest in the subject matter of said causes, and at the time of the rendition by this Honorable Court of its decision in said causes and the entry of the interlocutory decree therein plaintiff had no interest, beneficial, legal or equitable in the subject matter of said causes.

That long prior to the trial of these causes, to wit; during the month of February, 1916, the plaintiff assigned all its beneficial interest in Letters Patent number 1,104,175 to another corporation retaining only the bare legal title to said patent and assigned all rights and demands for damages and profits by

reason of past infringements of said letters patent on or about said date to said other corporation. That long prior to the decision by this Honorable Court in these causes, to wit: July 25th, 1916, plaintiff assigned by duly executed written assignment the legal title to said letters patent to said other corporation.

That by reason of said assignments each of said causes abated prior to the trial and decision therein and proceedings subsequent to said assignments are nugatory. [12]

At the hearing of said motion defendants will rely on and use all the records, pleadings, briefs and papers in the above-entitled causes and in said causes on appeal before the United States Circuit Court of Appeals for the Ninth Circuit; duly authenticated copies of the opinion and decree of the Court, the records, pleadings, briefs and other papers filed in said suit of Dunkley Company (a corporation) and Michigan Canning & Machinery Company (a corporation), Plaintiffs, vs. Pasadena Canning Company and George E. Grier, Defendants, Equity No. C-8, heretofore referred to, together with duly authenticated photographs of exhibits in said suit, and also the affidavits of W. R. Roach, of Hart, Michigan, William K. White, of San Francisco, California, Kemper B. Campbell, of Los Angeles, California, W. R. McDermott, of Pecos, Texas, Mrs. T. H. Brigrance, of Ft. Worth, Texas, B. L. Russell, of Baird, Texas, George J. Stark, of Oakland, California, Charles M. Brodie, of San Jose, California, and Harrie E. Stewart, of Los Angeles, California, and other affidavits and documents to be produced prior to the hearing

upon said motion in accordance with the stipulation filed herewith; by which said defendants will show to the Court that they have discovered new evidence material to the issues herein, and that said evidence could not with due and reasonable diligence have been discovered prior to the trial of the above entitled action nor prior to the trial of said case of Dunkley Company et al. vs. Pasadena Canning Company et al.

KEMPER B. CAMPBELL,

F. S. LYON,

WM. K. WHITE,

Solicitors and Counsel for Defendants.

[13]

---

(Title of Court and Causes.)

**Stipulation Waiving Service of Copies of Papers  
to Be Used on Motion.**

IT IS HEREBY STIPULATED by and between the parties to the above-entitled causes, through their respective solicitors and counsel:

(1) That service upon plaintiff as required under Rule 41 of this Court of copies of papers, documents and affidavits to be used by defendants upon the hearing of the foregoing motion is hereby waived, it being further stipulated that service of said papers, documents and affidavits will be made five (5) days prior to the actual hearing of said motion.

(2) It is further stipulated that a copy of this stipulation need not be filed in each of the above-entitled actions but that a copy filed in the first named

thereof shall be considered as filed in each of said causes.

Dated this 4th day of October, 1918.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Solicitors and Counsel for Plaintiff.  
KEMPER B. CAMPBELL,  
F. S. LYON,  
WM. K. WHITE,  
Solicitors and Counsel for Defendants.

It is so ordered.

Dated October 14th, 1918.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Oct. 14, 1918. Walter B.  
Maling, Clerk. [14]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.



IN EQUITY—No. 211.

DUNKLEY COMPANY,

vs.

Plaintiff,

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,

vs.

Plaintiff,

SUNLIT FRUIT COMPANY, Corporation,  
Defendant.

### Affidavit of August M. Augensen.

[ 15 ]

State of Illinois,  
County of Cook—SS.

AUGUST M. AUGENSEN, being first duly sworn, deposes and says: That he is employed as traveling engineer for the American Can Company, and has been in said company's employ since the year 1901, and that for nine years prior to that time affiant was employed by Edwin Norton and by Norton Brothers, who were the organizers of the said American Can Company.

That affiant visited the South Haven factory of Dunkley Company early in the year of 1902, and in August, 1902, in installing a line of machinery in said factory; that from the middle of March until October, 1904, affiant, under an arrangement between the American Can Company and Mr. Edwin Norton, worked for said Edwin Norton at Dunkley Company's factory at South Haven installing machinery.

That upon the arrival of affiant at said factory in March, 1904, affiant saw Stewart Campbell working on a new lye peach peeling tank near the east end of the main room of the factory on the south side; that later on a brush machine was installed with said lye tank and peach pitting machines were also put in; that said lye tank was about 12 or 14 feet long and 40 inches wide, and from 6 to 18 inches deep, having a circular transverse pocket across the bottom near one end and at its deepest part; that the brush machine was a three line machine having six cylindrical revolving brushes and three brush conveyor belts. There were also perforated pipes above the conveyors and below the brushes for the delivery of water to assist in the cleansing of the fruit; that said machine was installed by Stewart Campbell, whom affiant saw at various times working upon said machine; that during the peach peeling season of 1904 William Tiece was in [16] charge of the operation of the said machine; that no other machine than the one just referred to was operated at the Dunkley factory in the peach season of 1904.

That in the summer of 1904 and a short time prior to the opening of the peach season, affiant saw Melville Dunkley experimenting with a few peaches in a heated solution of lye; that said Melville Dunkley told affiant at that time that he was experimenting with the lye process that Dunkley Company intended to use.

That affiant during the peach season of 1904 had lunch almost daily with Melville Dunkley, Arthur

Norton (son of Edwin Norton), Martin DeLoof (Dunkley's bookkeeper) and others, and that at such times the lye peeling machines and the lye process which was to be used was referred to by Norton and Dunkley as "the new system", and said Norton and Dunkley frequently stated that they hoped that the same would prove to be a good system and would be successful.

That affiant has seen photographs as represented on pages 1123, 1124 and 1125 of Plaintiff's Exhibit "A" in said case of Dunkley Company et al. vs. Pasadena Canning Company et al., entitled "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine", and Dunkley's Exhibit No. 2, Photograph 3 of Second Machine", respectively, copies of which said photographs are hereto annexed and marked respectively Exhibits "A", "B", and "C" hereof.

And affiant has also seen pages 476, 477 and 478 of a copy of Patent Appeal Docket 790 (Interference No. 30610), said pages containing photographs entitled respectively "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine" and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine"; that said photographs represent the brush part of said machine only and do not include the lye tank. [17]

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said tes-

timony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit, in any or all of the above-entitled causes and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) A. M. AUGENSEN.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

(Signed) P. H. KNOP,

[Notarial Seal]

Notary Public in and for the County of Cook, State of Illinois.

(Three photographic exhibits attached same as exhibits on George K. Brown's affidavit.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff.

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff.

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff.

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff.

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff.

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff.

vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Supplemental Affidavit of August M. Augensen.**

County of Cook,

State of Illinois,—SS.

AUGUST M. AUGENSON, being first duly sworn, deposes and says: That he is the same August M. Augensen who heretofore, to wit, on the 30th day of November, 1918, made affidavit in the above entitled causes before P. H. Knop, notary public in

and for [19] the County of Cook, State of Illinois, and affiant makes this affidavit as supplementary thereto and explanatory thereof.

That the photographs referred to on page 3 of affiant's affidavit of November 30th, 1918, are photographs of the brush part of the lye peeling machine which was installed in the Dunkley South Haven factory in the spring of 1904; that said machine at the time of its installation was new and had never been used previously for the peeling of peaches.

(Signed) AUGUST AUGENSEN,

Subscribed and sworn to before me this 18th day of February, 1919.

[Notarial Seal]

(Signed) LESLIE E. BINCH,

Notary Public in and for the County of Cook, State of Illinois.

[Endorsed]: Filed February 24, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[20]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Thomas Brazill.**

State of Michigan,  
County of Kalamazoo,—ss.

Thomas Brazill, being first duly sworn, deposes [21] and says that he is now and for many years last past has been a resident of the City of Kalamazoo, Michigan; that during the year 1904 he was employed as bookkeeper for the Kalamazoo Foundry and Machine Company, of Kalamazoo, Michigan, and as such had charge of the books of entry which were regularly kept by said Kalamazoo Foundry and Machine Company; that on March 31 and April 30, 1904, Stewart Campbell ordered of Kalamazoo Foundry and Machine Company, certain work and materials for Dunkley Company, which were subsequently paid for by said Dunkley Company, and that said work was done and said material furnished as indicated in defendant's Exhibit 37, on file in the case of Dunkley Company vs. Pasadena Canning Company, Equity C-8, in the United States District Court, Southern Dis-

trict of California, Southern Division, which said Exhibit 37 is hereby referred to and made a part hereof.

That said Stewart Campbell informed affiant that said work and materials were for a peach-peeling machine which he was then constructing for Dunkley Company, and that said device was a new invention; affiant further states that the material thus furnished was delivered to the shop of William Decker at Kalamazoo, Michigan.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes [22] the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) THOMAS BRAZILL.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

(Signed) THOS. P. GLEASON,  
Notary Public in and for County of Kalamazoo, State of Michigan.

My Com. Expires Aug. 30, 1920.

(Attached hereto are Exhibits "A", "B", "C", "D" and "E").



Received copy of within affidavit this 17th day of  
February, 1919.

FRED L. CHAPPELL and

W. A. RICHARDSON,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,

Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES

COMPANY,

Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,

Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,

Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,

Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,

Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Katherine H. Breen.**

State of Michigan,  
County of Kalamazoo,—ss.

Katherine H. Breen, being duly sworn, deposes and says:

That she is now and for many years has been a resident of Kalamazoo, Michigan. For some seventeen or eighteen years she worked for the Clark Engine & Boiler Company which was started by her father. She worked there during the years 1903-4. Exhibit "A" hereto attached is a true photograph of an order sheet of the Clark Engine & Boiler Company and is in her handwriting. Order sheets such as this were made up immediately from orders received. [24] Every order was given a number and this number was placed on the order sheet. This explains the order No. 9463 appearing on this particular order sheet. "Jan. 30, 1904" stamped on the upper right hand corner of the order sheet means that the tank referred to in the order sheet was shipped out that day.

Affiant was a witness in the case of Dunkley Co. et al. v. Pasadena Canning Co. et al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, giving her testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to her said testimony of record in that case and hereby makes her said testimony, as therein set forth, a part of this affidavit as if fully set forth herein. Affiant will testify in the above-entitled causes or any of them, or in any other suit or proceeding involving the validity of let-

ters patent 1104175 as to the facts set forth in this affidavit.

(Signed) KATHERINE H. BREEN.

Subscribed and sworn to before me this 8th day of February, 1919.

[Notarial Seal]

(Signed) URAL S. ACKER,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

(Attached hereto is photographic Exhibit "A".)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.



IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

### Affidavit of George K. Brown.

State of Michigan,  
County of Allegan,—ss

George K. Brown, being first duly sworn, deposes and [26] says: That he is now and for ten years last past has been engaged in farming on his farm at Wayland, Michigan; that affiant worked for S. J. Dunkley and Dunkley Company from the fall of 1899 to the year 1908, when the Dunkley Company went into bankruptcy. For a number of years during that period affiant was superintendent of the Hartford factory of Dunkley Company; that during the 1903 peach season, owing to a light peach crop, he was engaged at the South Haven factory. Affiant fixes this time of his employment there by memoranda dated October 15 and 21, 1903, pertaining to work done at that factory; also from the fact of his being employed with one William Brunner in the pickling department at South Haven, said Brunner having been employed there but the one season only; and also from a group

photograph containing affiant's likeness in which there appears the date "October 19, 1903"; that affiant during said peach season was also employed from time to time in repairing machines and in other mechanical work; that in connection with such employment affiant was throughout said 1903 peach season in the room daily where peaches were being peeled; that all of the peaches which were canned at the Dunkley factory during the season 1903 were peeled by hand or by small Sinclair-Scott hand peeling machines; that for this purpose a 150 foot hand peeling table was made and installed by Stewart Campbell in July and August, 1903; that along this table on either side thereof women were seated on a raised platform and peeled the peaches by hand, said peaches being afterwards dumped upon the conveyor belt and thus carried to the filling table.

That affiant while at South Haven in the peach season of 1903 saw the first experimental model peach peeling machine in the basement of the Dunkley factory while said machine was being constructed by Stewart Campbell.

That along in the latter part of October, 1903, affiant saw said first experimental machine just after a few peaches had [27] been run through it; that said machine had no lye tank attached to it, and that affiant saw no lye tank at the Dunkley factory in 1903; that said experimental machine was not used for the peeling of peaches commercially during the peach season of 1903; that no peaches were peeled in commercial quantities by a lye peach peeling machine during the peach season of 1903 at the Dunkley factory at

South Haven; that prior to the fruit season of 1903 affiant was engaged in the Kalamazoo factory of the Dunkley Company, and while there he saw in use in that factory a galvanized tank or retort about  $3\frac{1}{2}$  feet tall and about 30 inches across, made of boiler iron and having a cover that was made steam-tight by a gasket and stud bolts about  $1\frac{1}{2}$  inches or 2 inches apart; that at the time affiant saw said soup tank or retort the same was new; that in February, 1904, affiant saw in the Kalamazoo factory of Dunkley Company the tank which was later that year installed in the South Haven factory as a part of the lye peach peeling machine; that later that spring affiant saw Stewart Campbell setting up said tank at South Haven and also saw Campbell setting up and installing the roller brush apparatus therewith; that said lye tank with conveyor and said roller brush apparatus constituted the first commercial lye peach peeling machine which was installed in the Dunkley South Haven factory; that no tank for peach peeling purposes had been installed or used in said factory prior to the summer of 1904.

That affiant has seen the photographs as represented on pages 1123, 1124 and 1125 of Plaintiff's Exhibit "A" in said case of Dunkley Company et al. vs. Pasadena Canning Company, et al., entitled "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine" and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine", respectively, copies of which said photographs are hereto annexed and marked respectively Exhibits "A", "B" and "C" and made a

part hereof, and that said photographs are photographs of the brush part of the Dunkley first commercial lye peach-peeling machine, [28] the machine which was made and installed in Dunkley Company South Haven factory in 1904.

That affiant was a witness in said case of Dunkley Company et al. vs. Pasadena Canning Company et al. and testified therein; and affiant hereby refers to the transcript of his testimony of record in that case, and hereby makes said transcript a part of this affidavit as if fully set forth herein; that affiant will testify in the above-entitled causes, or any of them, or in any other suit or proceeding involving the validity of letters patent 1104175 to the facts as set forth in this affidavit.

(Signed) GEORGE K. BROWN.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

(Signed) FRANK CHAMBERLAIN,  
Notary Public in and for the County Allegan, State  
of Michigan.

[Notarial Seal]

My commission expires March 3, 1921.

(Attached hereto are photographs.)

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Supplemental Affidavit of George K. Brown.**

State of Michigan,  
County of Allegan,—ss.

George K. Brown, being duly sworn, deposes and says: That he is the same George K. Brown who heretofore made affidavit in the above-entitled actions dated November 29th, 1918, and makes [30] this affidavit as supplementary thereto.

That the tank referred to by affiant in lines 9 to 13, inclusive, on page 3 of said affidavit, was a round tank, cylindrical in form, the ends thereof constituting its top and bottom, the top or cover being removable, as described in affiant's former affidavit; that said tank was used exclusively for the cooking of soups and was at no time during the year 1903 used, and the same could not have been used, as a lye tank with conveyor therein for the peeling of peaches.

That the frame of Dunkley's "first experimental model peach peeling machine" referred to in affiant's said affidavit was introduced in evidence as "Defendants' Exhibit 11" in the case of Dunkley Company et al. vs. Pasadena Canning Company et al.; a copy of a photograph of said machine is hereto annexed marked "Exhibit D" and is hereby made a part hereof.

That prior to the season of 1903 there was a freight elevator in the Dunkley factory at South Haven located on the north side of the westerly part of the east wing, and that said elevator was used and operated for the transportation of supplies from one floor of said factory to the other and to and from the basement; that during the early part of the fruit season of 1903 a number of deaf and dumb men were employed at said factory some of whom took said elevator to basement and applied the brake but did not lock same; the brake became loose and elevator went to top of shaft breaking elevator and said elevator was not repaired during the peach season of 1903, but the opening in the floor therefor remained uncovered, being protected by a fence or barrier which sur-

rounded it and the posts or standards constituting the elevator shaft remained in place during that season; that in 1904 said opening in the floor was boarded over and said barrier and posts removed.

That affiant fixes the date of his employment at the Dunkley South Haven factory during the peach season of 1903 by [31] many circumstances, among which is a picture, a copy of which is hereto annexed, marked Exhibit "E" and is hereby made a part hereof; that in said picture is a photograph of affiant and also a photograph of William Brunker, who was employed at said factory and was in South Haven during the 1903 season only, and photographs of some of the deaf and dumb employees who were also employed at the Dunkley factory during the peach season of 1903; that this picture was taken during the peach season, as indicated by the fact that at least two of those appearing in the photograph are holding peaches in their hands; that affiant's photograph is the ninth from the left of those who appear in said picture as standing in the rear of those seated; that said picture was introduced in evidence in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., as Defendants' Exhibit 12 and Defendants' Exhibit 4.

(Signed) GEORGE K. BROWN.

Subscribed and sworn to before me this 11th day of February, 1919.

[Notarial Seal]

(Signed) FRANK CHAMBERLAIN,  
Notary Public in and for said County of Allegan,  
State of Michigan.

My Commission expires March 3, 1921.

(Attached hereto are exhibits "D" and "E".)

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Mrs. George K. Brown.**

State of Michigan,  
County of Allegon,—ss.

Mrs. George K. Brown, being first duly sworn, [33]



deposes and says that she resides near Wayland, State of Michigan; that she commenced working for S. J. Dunkley in 1896 and was employed at the Dunkley South Haven canning factory every year from that time until February 4, 1904, when she was married to George K. Brown, who was then superintendent of Dunkley Company's Hartford factory; that during the peach season of 1903, affiant was employed as inspectress, or forelady, over the parers, being engaged in a capacity similar to that of Mrs. Kern in overseeing the work of the women who were peeling peaches; that affiant fixes in her mind the conditions that obtained in the South Haven factory during the peach season of 1903 from the fact that it was the last season that she worked there.

That there was no lye peeling machine operated commercially in the South Haven factory during the peach season of 1903; that, on the contrary, all peaches canned at Dunkley Company's South Haven factory, during said peach season of 1903, were peeled by hand and by little Sinclair-Scott hand peeling machines; that no peaches were brought to the long peeling table, or to any of the women who were engaged in said factory to be pitted which had previously been peeled by the lye process.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to [34] testify

in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. GEORGE K. BROWN,

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

(Signed) FRANK CHAMBERLAIN,  
Notary Public in and for County of Allegon, State of Michigan.

My commission expires March 3, 1921.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed:] Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,              Defendant.

**Affidavit of Fred J. Buckley.**

State of Michigan,  
County of Kalamazoo,—ss.

Fred J. Buckley, being duly sworn on oath, deposes and says:

That he is now and for many years has been a resident of Kalamazoo, Michigan. He is manager of the Kalamazoo Foundry & Machine Company, which is frequently spoken of as Buckley's. He was connected with this company in 1903-4. Exhibits "A", "B", "C", "D", and "E", hereto attached are true photographs of carbon copies of invoices for work done by the Kalamazoo Foundry & Machine Company [36] for the Dunkley Company. The Company kept these carbon copies as a permanent record. Its ledger accounts are based on them. Most of the items referred to in these invoices were furnished for the Dunkley Company at the instance of Stewart Campbell. Campbell gave most of the orders for work that had to do with peach-peeling machinery. Some of the articles referred to in the invoices, of which photographs are

attached, were delivered to the Kalamazoo Machine & Tool Company, usually spoken of as Decker's. He thinks the articles were castings.

Affiant was a witness in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, giving his testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to his said testimony of record in that case and hereby makes his said testimony, as therein set forth, a part of this affidavit as if fully set forth herein. Affiant will testify in the above-entitled causes or any of them, or in any other suit or proceedings involving the validity of letters patent 1104175 as to the facts set forth in this affidavit.

(Signed) FRED J. BUCKLEY,

Subscribed and sworn to before me this 8th day of February, 1919.

[Notarial Seal]

(Signed) URAL S. ACKER.

Notary Public in and for the County of Kalamazoo,  
State of Michigan.

(Attached hereto are photographic exhibits "A", "B", "C", "D" and "E".)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.



[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [37]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,                  Defendant.

**Affidavit of Kemper B. Campbell.**

State of California,  
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, deposes and says: That he is one of the attorneys for the defendants in the above-entitled causes; that he was made an attorney of record in said causes at the time of the trial thereof on or about March [38] 28th, 1916, as a matter of courtesy only and upon motion of

William K. White, one of defendants' attorneys; that he was present at the trial of said causes solely by reason of a suit on the same patent having been instituted against certain of affiant's clients in the United States District Court in the Southern District of California, Southern Division, entitled Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8; that affiant appeared at the trial of the above entitled causes to observe the proof develop relative to the subject matter of the litigation; that affiant had no control and exercised no control over the trial or the preparation for trial of said causes or any of them; that affiant at the time of the trial of said causes had not been retained or employed by the defendants therein or by any of them, or by anyone on their behalf, to appear for them at the trial of said causes or any of them; that affiant was retained by defendants in the above entitled causes as an attorney in said causes on or about the 11th day of July, 1918, long subsequent to the trial of the above entitled causes; that affiant was attorney for the defendants in said case of Dunkley Company et al. vs. Pasadena Canning Company et al. filed in the United States District Court, Southern District of California, Southern Division, Equity C-8, filed on December 21st, 1915; that on or about January 11th, 1918, said cause was by the court set for trial on May 1st, 1918, and the date of trial thereof thereafter continued, so that the actual trial occurred May 21st, 1918, to July 6th, 1918.

That affiant had charge of the preparation of said cause of Dunkley Company et al. vs. Pasadena Can-

ning Company et al. for trial and during the preparation of said cause for trial additional evidence from that introduced in the trial of the above entitled causes was discovered, which evidence is material and relevant to the issues in each of the above entitled causes [39] and not merely cumulative and is as follows:

(a)

During the preparation of said cause for trial evidence of a prior use during the years 1894, 1895 and subsequent years of a machine to peel peaches using a lye process was discovered, said use being by Ida L. McDermett and W. R. McDermett at Baird, Callahan County, in the State of Texas, and consisted of a machine or device described as follows: a large metal vat or tank divided into three compartments; under one of these was a fire box to heat a solution of lye placed in said tank, clear water being placed in the other two tanks. In the compartment containing the lye solution was a perforated revolving metal cylinder or drum, so arranged that by means of a lever suspended overhead said cylinder or drum could be raised from that compartment and moved at will to the other compartments, the entire apparatus being mounted on a wooden frame. Peaches were peeled by the use of said machine in the following manner: a fire was provided under the compartment containing the lye solution. The revolving perforated cylinder or drum was partially filled with peaches, immersed and revolved in the hot lye a sufficient length of time to disintegrate the peeling, then raised by means of a lever and transferred to the other compartments and

revolved in them to wash off the peelings which the lye had previously disintegrated. The revolving cylinder or drum being perforated all around, on being immersed in the water tanks the water would enter the drum and wash the peeling off the peaches, as aforesaid. That seven of said machines were manufactured by said McDermetts and sold to various persons in the state of Texas and by them used for the purpose of peeling peaches for the market.

That proof of the successful use of said machine for peeling peaches as aforesaid from the year 1894 on was made at the trial of said cause of Dunkley et al. vs. Pasadena [40] Canning Company et al. by the testimony of the following credible persons: W. R. McDermett, now of Pecos, Texas, Mrs. T. H. Brigrance of Fort Worth, Texas, A. T. Young of Callahan County, Texas, B. L. Russell of Baird, Texas, and Mrs. B. L. Russell of Baird, Texas; that said witnesses are willing to testify in the above entitled causes to the use of said machine in the State of Texas for the peeling of peaches for the market from the year 1894 on, as aforesaid; that affidavits of said witnesses, stating the facts of said use and their willingness to testify before this court to said facts have been filed herein in support of the motion pending before this court; that the testimony of said witnesses to the facts of such use can be produced before this court.

That the evidence of said witnesses is newly discovered and on information and belief affiant states that said evidence was not known to any of the counsel or the defendants in the above entitled cause at the



time of the trial of said causes. That affiant learned of said machine and said use at Baird, Texas, in the following manner: that during the latter part of the month of January in the year 1918, one Earnest Aycock, a resident of the City of Glendale, State of California, met affiant at the residence of affiant's father-in-law, D. J. Hibben, in the City of Glendale, and informed affiant that he, the said Earnest Aycock, had known one W. R. McDermett at Baird, Callahan County, Texas, and said McDermett had invented and used a machine for the purpose of peeling peaches by lye, said Aycock fixing the date of said use by McDermett as being prior to 1900, about 1895 or 1896. That thereupon, pursuant to said information, affiant sent a letter to W. R. McDermett, dated February 11th, 1918, addressed to him at Baird, Callahan County, Texas, stating that affiant was interested in discovering whether said McDermett had ever used a machine to peel peaches with a lye process. In March, 1918, affiant received an answer to said communication [41] from said McDermett from Pecos, Texas, dated March 3rd, 1918, in which letter said McDermett stated that he had used a machine for that purpose and described said machine; copies of said letters are hereto attached, marked Exhibits "A" and "B" respectively and made a part hereof as though set forth at length; that after receiving said letter from said McDermett affiant caused an extended investigation to be made in Texas relative to the use of the lye process and machines therewith, sending to Texas for that purpose one C. L. Bagley, a member of the bar of the State of California; that as a result of said

investigation, witnesses familiar with the use of the lye process and said machine as aforesaid were dis-

That on or about October 1, 1918, at the cannery covered.

of the Pasadena Canning Company, at Pasadena, California, a demonstration of said McDermett machine was made in the presence of affiant and other persons, said machine being operated under the direction of Mr. George E. Grier of said Pasadena Canning Company. That peaches were peeled at said demonstration by said machine, good, firm fruit being selected, and after having been subjected to the lye treatment and the peelings thereby disintegrated, the peaches were peeled in the cylinder of said machine and revolved in one of the compartments of the tank of said machine, which was partially filled with clear water, thirteen revolutions in sixteen seconds; thereupon, the cylinder was removed into the second compartment of clear water, and revolved eight revolutions in ten seconds; thereupon the cylinder was opened and the peaches removed. The peaches were perfectly peeled. Two other similar experiments were made and with the same result.

(b)

That upon the opening of the above-entitled causes or any of them for the reception of further evidence, defendants will prove to the Court the use of a machine to peel peaches, using the [42] lye process by W. R. Roach & Company at their cannery in Hart, Michigan, commencing with the year 1902, evidence of said use by W. R. Roach & Company being discovered through a letter dated November 22, 1917,

from W. R. Roach of Hart, Michigan, to Mr. George E. Grier, one of the defendants in said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. Said newly discovered evidence consists of proof that during the year 1902, about the middle of the peach peeling season, to wit, about September 15th of that year, a machine was devised to peel peaches with the lye process and used at said cannery of W. R. Roach & Company at Hart, Michigan, as follows:—a revolving cylinder of wire mesh used for washing peas, about ten or twelve feet long and four and one-half feet in diameter, mounted on a wooden frame and known as a “squirrel cage”, was used and operated for the purpose of peeling peaches as follows:—the previously halved and pitted peaches were placed in perforated pails and immersed in the lye solution and then dumped into a hopper; from this hopper they were carried by means of a conveyor or elevator to the cylinder into which they poured. A perforated water pipe was mounted within and parallel to the cylinder, from which sprays of water under pressure descended upon the peaches in the revolving cylinder, removing the disintegrated peeling from and washing the peaches. The cylinder was placed at an angle so that the peaches worked towards the opposite end from which they entered, finally being caught in pails or pans at such opposite end. By means of said machine about two-thirds of the peach pack of the cannery of said W. R. Roach & Company at Hart, Michigan, was peeled during the year 1902. That said device or machine was used at said cannery by said W. R. Roach & Company from

the year 1902 on. That the predecessors in business of said W. R. Roach & Company at Hart, Michigan, for a number of years prior to 1902, to wit: from about 1894 on, had peeled peaches by means of the lye process in the following manner:—the peaches to be peeled were halved and [43] pitted and then placed in perforated pails and immersed in a tank containing a lye solution a sufficient length of time to disintegrate the peelings, the pails being then taken out of the solution, placed on the floor and the peaches washed off with cold water by means of a hose under strong pressure. That this method of peeling peaches was used by W. R. Roach & Company at their said cannery in Hart, Michigan, during the first part of the season of 1902 and prior to the use of said machine as aforesaid.

That affiant on a trip to Michigan and vicinity during the months of February and March, 1918, interviewed witnesses who had made or used this device at said factory; that at the trial of said cause of Dunkley Company vs. Pasadena Canning Company proof of said use and said machine was produced to that court by the following credible witnesses: E. S. Frey, W. R. McRae, and Mrs. Lettie La Vaque of Hart, Michigan, and Mrs. Olive S. Kidder, now of Detroit, Michigan, which said witness had been employed at said factory of W. R. Roach & Company at Hart, Michigan, in the year 1902 and subsequent to said year. That said witnesses are ready, willing and able to testify to the above-entitled causes or any of them and affidavits of said persons as to their knowledge of said use and their willingness to testify are



filed herein in support of the motion now pending before this court.

That a photograph of a machine of the identical type used by W. R. Roach & Company in 1902 and thereafter is annexed hereto and marked Exhibit "C" and is hereby made a part hereof. That the identical machine from which said photograph, Exhibit "C", was taken was used as an exhibit in the case of Dunkley Company vs. California Packing Corporation before the District Court for the United States District Court, Southern District of New York, also involving the validity of letters patent No. 1,104,175, and peaches were successfully peeled by said machine in demonstration before [44] the Court.

(c)

That during the preparation of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. for trial there was called to affiant's attention for the first time a publication known as "Archdeacon's Kitchen Cabinet", which was published in 1876; said publication described the lye process for peeling peaches as follows: Commencing at Page 133 of said publication:

#### "CANNING OF FRUITS.

---

"To Can Fresh Peaches by The Latest Scientific Method.—Commercial.

"Have conveniently arranged, a farmer's 25-gallon dairy kettle. And a cooling tub, so arranged that cold water may flow in at the bottom through a pipe, and an opening 4 inches below



the top, for an overflow, that the water may run out as fast as it flows in. To keep it cold, provide also, a 2 or 4-quart dipper, with a long handle, and  $\frac{1}{2}$  in. perforations in the bottom. Dissolve a can of concentrated lye in boiling water in the kettle and keep it boiling hot. Fill the dipped  $\frac{3}{4}$  full of hard but ripe peaches; lay out the soft ones and pare them by hand. Now, hold the dipper containing the peaches, immersed in the boiling lye a few minutes, until the skin is a little slippery and soft, which the operator must learn more exactly by practice. When the peaches are scalded just enough, raise it out and drain a moment, then quickly immerse into the cold water, and by a shaking motion of the dipper wash out the lye, and by the rolling motion of the peaches rub off their shriveled and wrinkled skins, which should leave them clean and white. Have also another tub of cold water, in which to immerse the dipper of peaches, and wash clean, then drain, and pass them to be cut in halves, lengthwise of the pits; remove the pits and put the fruit into cans, having in each two tablespoonsful of sugar; then fill them with boiling water and solder up tight, and process 15 or 20 minutes without venting, and cool immediately. By this method of removing the skins, about 25 per cent of labor and about the same amount in fruit will be saved. By this hot bath the pores of the fruit are opened, and the air to some extent is forced out. And by the sudden immersion in a cold bath the pores

are again closed, which better preserves the flavor, and the peaches. Great care, however, must be taken to keep the lye, boiling hot, strong, clear and clean, renewing when necessary; and also the cold water baths must be kept clean and cold, by using ice if necessary. If these conditions are not strictly maintained the peaches may turn dark colored. But if all the work is performed with care and skill, superior goods will be produced at less [45] cost. The early and late white Crawfords are the best variety of peaches for canning, and should be fresh picked from the trees as nearly as possible."

that said publication has been in possession of one Charles M. Brodie of San Jose, California, for twenty-five years last past, having been given to said Brodie by his father; that said Brodie testified at the trial of said Dunkley Company et al. vs. Pasadena Canning Company et al., and is willing to testify in the above entitled causes or any of them to the fact of such ownership of said publication, laying the foundation for the introduction of the same in evidence, and an affidavit of said Brodie is filed herein in support of the motion pending before this court.

That said publication is newly discovered evidence and on information and belief affiant states that the same was not known to any of the counsel or any of the defendants in the above-entitled causes at the time of the trial thereof; that said evidence is material and relevant to the issues in the above-entitled causes.

(d)

That on the opening of the above-entitled causes or any of them for the reception of further evidence, defendants will prove to the Court the use of a machine to peel peaches using the lye process near San Jose, California, by J. F. Pyle & Sons, commencing with the year 1901, said machine being described as follows:

A lye tank for the lye treatment or preliminary treatment of the peaches. Associated therewith a water tank, into which the lye treated peaches were delivered from the lye tank by means of an endless traveling carrier or flight conveyor which worked into, through and out of the lye or caustic solution bath of the lye tank and removed the peaches therefrom and, as carried over the delivery end of said lye tank, dropped the lye-treated peaches into the water contained in the water tank, the water tank being arranged end to end with the lye tank. Within the water tank there was another endless carrier or flight conveyor which removed [46] the peaches from within the water tank and deposited or discharged the same onto a horizontal and downwardly disposed vibrating or shaking table, the receiving end of which was situated at the discharge end of the water tank. Situated above the endless conveyor, working in the water tank for the removal of the peaches, there was a spray water pipe—that is, a perforated water pipe which received water therein under pressure and which water was discharged from the pipe as jet streams onto the lye-treated fruit as removed from within the water tank by the endless conveyor or carrier. At the head of the vibrating or shaking table,

on which the peaches were deposited after leaving the water tank, a slight distance above the table was arranged a second perforated coiled water pipe, the jet streams of water issuing therefrom playing or being directed onto the peaches as the same moved beneath the pipe under the influence of the vibrating action of the shaking table.

In the use of said machine or apparatus the peelings of the peaches were disintegrated by the hot lye solution in the first tank and said disintegrated peeling was removed by the action of the water and water jet streams issuing from the nozzles and perforated pipes above referred to. In said apparatus there were four separate means of turning the fruit: first, the elevator from the water tank; second, the dropping of the fruit onto the agitating table; third, the action of the agitating table; and, fourth, the dropping of the fruit from the agitating table into the discharge boxes connected therewith.

(e)

That during the months of February and March, 1918, affiant spent six weeks' time in the eastern part of the United States, particularly in the State of Michigan, investigating the claims of S. J. Dunkley and his son, Melville E. Dunkley, as asserted at the trial of the above entitled causes, the claims of said S. J. Dunkley and his said son asserted at the trial of the above-entitled [47] causes being that a model machine was made in 1902 and that peaches were peeled by it at that time; that during the peach season of 1903 a commercial machine was made which was operated extensively, approximately seventy-five per



cent (75%) of the entire pack of peaches being peeled by said lye peeling machine. These claims were made notwithstanding the fact that during the Interference Proceedings in the Patent Office in 1910 said S. J. Dunkley and his said son had both testified that the first or model machine was made in the summer of 1903; and in 1915 in the cause of Dunkley Company vs. California Canneries Company, before this very Court, S. J. Dunkley in response to a searching examination by the Court, did not testify that the first or model machine was made and used prior to 1903. That affiant during his said investigation located numerous photographs in the possession of various persons of the interior of the Dunkley factory taken during the year 1903 and many other documents which conclusively establish the fact that no commercial machine was in operation in said factory during the year 1903; that affiant interviewed a great many persons who were employed in said Dunkley factory at South Haven, Michigan, during the years 1902, 1903 and 1904; that some of those interviewed informed affiant that they were present when the original model machine was being constructed and that said model machine was constructed during the fall of 1903 and subsequent to July of that year, and not in 1902, as testified by the two Dunkleys, and that said model machine was first tried out in October, 1903, and that the first commercial machine was made during the spring of 1904 and first tried out and used during the late summer and fall of 1904; that said persons so employed in the said Dunkley factory during said years informed affiant that no lye peeling



machine of any kind was used commercially by said S. J. Dunkley or Dunkley Company during the year 1903, but, on the contrary, during the season of 1903 all the peaches packed at said South Haven factory were peeled by the [48] use of knives; that at the trial of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. before the Honorable Oscar A. Trippet, said photographs and documents were introduced in evidence and more than thirty of said former employees in the Dunkley factory and ten other witnesses testified as aforesaid, and in the memorandum opinion filed in said case the Court found that the Dunkley conception was not made until 1903; that the affidavits of many credible persons who testified at the trial of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. are filed herein in support of this motion and that each of said witnesses is ready, willing and able to testify in the above entitled causes or any of them.

That the testimony of each and all of said witnesses is newly discovered evidence and such evidence could not with reasonable diligence have been produced at the trial of the above-entitled actions.

That on the trial of the above-entitled causes, Melville E. Dunkley testified on behalf of the plaintiff herein, that the records of the Dunkley Company relative to the construction of the first machine and tank by the Dunkleys were destroyed by fire, his testimony in that regard being as follows (San Francisco Record, 444, 445):

“Q. Have you no records whatever showing the purchase of any parts for this first experimental model machine or the first commercial

machine? A. The only record we have at the present time on this first machine covers the purchase of the first simple experimental tank that was built, that was used with this in 1903; otherwise we have practically no records left. What few records were left were at South Haven covering the transactions of the factory work at South Haven, and were burned when we had a complete fire loss in 1912."

and on appeal from the decision of this Honorable Court in the above-entitled causes, the appellee in its brief stated the following with reference to the loss of the records of the Dunkley Company by fire: [49]

"Another criticism made against the Dunkleys is that they produced no written records, but counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record to the effect that in 1912 the Dunkley cannery was destroyed by fire and their records were lost." (Reply Brief Appellee, p. 59.)

That at the trial of the case of Dunkley Company et al. vs. Pasadena Canning Company et al. it was shown that the Dunkley factory at South Haven had been abandoned from the year 1908 to 1912, and that there were no books of account or records at this abandoned factory prior to the fire. This was proven by witnesses William Spencer, William McEwing, Leander Kern and Martin De Loof, and Melville Dunkley, testifying in said cause, repudiated his testimony given before this Honorable Court at the time of the trial of the above-entitled causes, and admitted

that he did not know that there were any books or records in the South Haven factory at the time of trial, his testimony in that regard being as follows:

"MR. HENEY.—Q. I think I will have to ask you to say yes or no. I am not asking you what is in them now. I ask you if you mean to say that you know that there was in that factory at the time it was burned any book or record that contained any evidence relating to the time of building, or the material that went into the experimental model machine, or the first commercial machine.

"MR. CHAPPELL.—That is incompetent, immaterial. The witness has not said anything about any records of any materiality to the case; not proper cross-examination.

"MR. BLAKESLEE.—The witness is not competent to testify whether it be evidence or not.

"THE COURT.—I would like to have that testimony explained, what he meant in the San Francisco case. The objection will be overruled.

"MR. BLAKESLEE.—Exception.

"A. Read the question, please?

"(Last question read by the reporter.)

"A. Why I wasn't there when that fire started. I don't see how I could be expected to say that I knew anything was in there. I hadn't been around there for a couple of years previous to that fire.

"By MR. HENEY.—Q. Then you didn't mean to say that you knew there was any book or record in there in the San Francisco trial?

"MR. BLAKESLEE.—Same objection.

"A. No, sir; I don't think I did say so.

"By MR. HENEY.—Q. At any rate, if you did say so, you didn't mean to say that you did?

"A. No, sir." (L. A. Rec. pp. 1401, 1402.)

[50]

That during the preparation of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. for trial, there was called to affiant's attention an article in the South Haven Daily Tribune, published October 1st, 1903, which described the Dunkley factory at South Haven, Michigan; that the writer of said article, Lyman L. Crosthwaite, was produced at the trial of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. and testified, after refreshing his recollection from said article, as to the means and methods of peeling peaches in said cannery in the year 1903, his said testimony appearing in his affidavit filed herein in support of the motion now pending before this court.

That subsequent to the trial of the above entitled causes and subsequent to the trial of the cause of Dunkley Company et al. vs. Pasadena Canning Company et al., there was called to affiant's attention by one Bert McFarland, of South Haven, Michigan, an article in the Tribune-Messenger, a daily newspaper published in South Haven, Michigan, during the year 1904, and thereafter, in the issue of said paper for April 22, 1904; that said article was written by said Lyman L. Crosthwaite, as appears from his affidavit filed herein, in support of the motion now pending before this court.



That affiant is informed and believes and so states, that S. J. Dunkley, in the year 1904, was a stockholder in the corporation owning said Tribune-Messenger and that said S. J. Dunkley became a director of said corporation and said Tribune-Messenger in the year 1905.

That at the trial of the cause of Dunkley Company et al. vs. Pasadena Canning Company et al. the plaintiff produced and introduced in evidence certain correspondence between S. J. Dunkley and one Edwin Norton, and certain correspondence between S. J. Dunkley and one O. W. Norton, who was a brother of the said [51] Edwin Norton. That said Edwin Norton was a stockholder largely interested financially in the Dunkley Company, during the years 1901 to 1908, said correspondence appearing at pages 4112 to 4172 of the record of said cause of Dunkley Company vs. Pasadena Canning Company et al. and by this reference made a part hereof.

That at the trial of the above-entitled causes, Melville Dunkley, testifying on behalf of the plaintiff, denied that a long hand peeling table was used at the Dunkley cannery at South Haven in the year 1903 but, on the contrary, testified that the same was put in said cannery in the year 1904 and that it was not a peeling table but an inspection table. That on the trial of the case of Dunkley Company vs. Pasadena Canning Company et al. Melville Dunkley admitted that the long table was at said cannery in the year 1903. (L. A. Rec. 1449.) [52]

(f)

That at the trial of said cause of Dunkley Company



et al. vs. Pasadena Canning Company et al. one Robert I. Bentley testified that during the year 1902 he was general manager of the California Fruit Cannery Association which owned and operated a cannery at Fresno, California, during the year 1902 and 1903; that during the year 1902 at said cannery, said cannery being in charge of one C. J. Vernon, a machine was used to peel peaches, said machine being an adaptation of the Baker-Chalker orange washer; that in said year of 1902 at said cannery, practically the entire peach pack of said cannery was peeled by means of said machine, amounting to approximately 2,400,000 two and one-half pound cans; that said machine was likewise used at said cannery in the year 1903 and a pack of approximately the same size was peeled in 1903 by said machine; that in the year 1903 said California Fruit Cannery Association installed another of said machines at its cannery at Hanford, California, and used the same for the purpose of peeling peaches which were being prepared for drying; that said Bentley testified that on said machine jets or sprays of water were used to peel the peaches; that at the trial of Dunkley Company et al. vs. Pasadena Canning Company et al. one Fred L. Stebler testified that he, said Stebler, during the year 1902, had visited the said cannery of the California Fruit Cannery Association, at Fresno, California, and on said visit had observed in said cannery a machine used to peel peaches, said machine being an adaptation of the Baker-Chalker orange washer, using sprays or jets of water in addition to the brushes for the purpose of peeling the peaches; that affidavits of said Bentley

and said Stebler are filed herein in support of the motion now pending before this Court.

That at the trial of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. a test was had at Selma, California, in the presence of the Court, and a Dunkley brush [53] machine used to peel peaches; that witnesses who observed said demonstration and who had seen the Baker-Chalker machine used at Fresno in the year 1902 at the cannery of the California Fruit Cannery Association, testified in said cause that said Dunkley machine so demonstrated at Selma, and the Baker-Chalker machine operated at Fresno, were identical in construction and in mode of operation except that on the Dunkley machine there were three pipes with one row of perforations in each, and small brushes were mounted upon the conveyor belt, while on the Baker-Chalker machine there was one water pipe with three separate rows of perforations for delivering the water upon the peaches, and there were no brushes mounted upon the conveyor belt, said witnesses being Newton Lushbaugh, J. B. Cobbey, S. R. Combs and H. R. Baker; that affidavits of said witnesses are filed herein in support of the motion now pending before the Court.

That in the trial of the cause of Dunkley Company vs. California Packing Corporation before the United States District Court, Southern District of New York, during the month of October, 1918, a Baker-Chalker orange washer, such as was used at the cannery of the California Fruit Cannery Association at Fresno in 1902, was introduced in evidence and a demonstration had before the Court, said machine peeling

peaches in the presence of the Court; that the Hon. A. N. Hand, the Judge presiding at said trial at the time of said test, made the following partial finding, using the following language, as appears in the transcript of the evidence introduced on said trial:

“BAKER-CHALKER BRUSHER MACHINE LIKE VERNON USED.

“This machine has never heretofore been offered in evidence. A pressure of thirty-five pound spray was applied; the peaches treated in a lye bath, and passed over brushes were satisfactorily brushed, the skin being well removed from crevices. The pressure of the Dunkley machine was thirty-five pounds also and the speed the same.” [54]

That the testimony of said witnesses can be produced before this court on a rehearing of the above-entitled causes, or any of them.

(g)

That at the trial of said Dunkley Company et al. vs. Pasadena Canning Company et al., evidence of the use by one David W. Hobson, commencing in the year 1899, of a machine for the purpose of preparing prunes for drying was introduced, said machine consisting of a tank into which a lye solution was put, a swinging prune dipping basket arranged to swing into and out of the lye solution within the lye tank, a hopper for receiving the lye-treated fruit as discharged from the swinging basket, together with a vibratory or shaking table, above which shaking table and adjacent to the discharge section of the hopper

receiving the lye-treated fruit, there was a water spray pipe provided with two jet outlet nozzles from which water under pressure was ejected onto the lye-treated fruit as delivered from the hopper on to the head end of the shaking or vibrating table. An affidavit of said David W. Hobson, describing said machine, is filed herein in support of the motion pending before this court.

That the motion in support of which this affidavit is presented was not filed prior to the date of its filing because the foregoing newly discovered evidence was not discovered until the spring of 1918 and all of said evidence was presented to the court at the trial of the case of Dunkley Company et al. vs. Pasadena Canning Company et al.; said trial of said case commenced May 24, 1918, and continued until the early part of July, 1918; that immediately upon the termination of said trial the preparation of this motion was commenced and diligently pursued to the time of the filing of said motion.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 16th day of February, 1919.

[Seal]

C. L. BAGLEY,

Notary Public in and for the County of Los Angeles,  
State of California. [55]

EXHIBIT "A".

February 11th, 1918.

W. R. McDermott, Esq.,  
Baird,  
Callahan County,  
Texas.

Dear Sir:

I enclose herewith a resume of a controversy now pending in the United States District Court here. I am informed that you were one of the pioneer users of the lye peeling process and no doubt have valuable information in regard to this matter.

I write particularly to ascertain whether you ever employed a *machine* for the removal of the disintegrated peeling from the peaches by means of the application of jets of water. If so, would like to get a description of the machine and the dates of its use.

Thanking you in advance for such information as you may give us, I beg to remain

Yours very truly,

KBC/NT.

Enc. [56]

EXHIBIT "B".

PECOS, Texas, Mar. 3rd, 1918.

Kemper B. Campbell,  
Los Angeles.

Dear Sir:

Your favor of Feb. 11th to hand and in reply will say, we patented a peach peeling process in 1893, after that we invented a machine for using the process.



(The lye process.) This machine consisted of three or more vats connected and set in a frame with a horizontal bar above with a roller on this bar with a leaver attached. A furnace to heat the fluid. We then had a perforated drum to revolve in the vats, with a bale by means of the roller and leaver above we could raise the drum and remove it to the next vat and so on until the peaches were washed clean, then open the lid to the drum and empty them without handling them. This machine was not patented but is still in use in some sections. This is about as good a description as I can give. The patent to the process expired in 1910.

Hoping that this may be of service to you,

I am very truly,

(Signed) W. R. McDERMETT,

Pecos, Texas.

Box # 364.

(Attached hereto is Exhibit "C.")

Received copy of the within affidavit this 17th day of Feby., 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITYJ—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Stewart Campbell.**

State of California,  
County of Alameda,—ss.

Stewart Campbell, being first duly sworn, deposes  
and says:

That he is now and for 14 years has been a resident  
of Berkeley, California. He is the same Stewart  
Campbell who testified in the above-entitled causes.

Affiant has seen pages 476, 477 and 478 of Plaintiff's Exhibit "F" in the case [58] of Dunkley Company et al. vs. Pasadena Canning Company et al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, comprising Patent Appeal Docket Number 790 (Dunkley-Beekhuis Interference) and containing therein certain photographs entitled respectively "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine," "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine", and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine", copies of which photographs are hereto attached, made a part of this affidavit, and marked and designated respectively Exhibits "A", "B" and "C" hereof; that said photographs are true and correct photographs of the brush portion of the peach peeling machine which was built under his direction in the winter of 1903-4, and which was set up under his direction prior to the commencement of the 1904 peach canning season at the Dunkley factory at South Haven, Michigan, at the place in said factory previously occupied by the long hand peeling table. That the said machine was the second brush machine for removing the previously disintegrated peeling from peaches made for Dunkley Company, said machine being designated in the above-entitled causes and in the Pasadena Canning Company case as "the Dunkley first commercial machine"; that the first machine made for Dunkley was made in the fall of 1903 and was referred to in said actions as "the Dunkley experimental model machine".

Referring to affiant's testimony in the above-entitled case, appearing at pages 529-30 of the record of said case on appeal, in which he testified as follows:

"Mr. WHITE.—Q. This morning you mentioned a peach-peeling machine constructed at the Dunkley factory. I request that you give the history of that machine from the beginning to the end, if you know the same.

"A. In 1903 Mr. Dunkley, in I think about August, along in August, told me that he wanted me to build a peeling machine for peeling peaches; that he had a man making experiments on the lye strength of it and so forth, as to how to take the peeling off the peach, and he wanted me to construct the machine, and I was to see him and get the data on the lye, what was required and go ahead and [59] build the machine; that was while I was working on this peach-table, peach-peeling table. After I got through, I went over the next day, or a day or so afterwards to Mr. Brunker, who was the one that was making the test on the lye; it was in the glass room attached to the main canning room, and he showed me what he had done with the lye and gave me an estimate of the time that they ought to be in the lye and the strength of the lye; he was using a hand brush and water after putting them through the lye, using the hand brush and water and rubbing the peeling off, and so from that work on the table I was figur-



ing out just how to go to work at it, to construct it, and I think it was on the 9th, I am not certain, that it struck me about how to tackle it,"

affiant did not intend thereby to fix August 9 as the exact date at which he started work on the Dunkley first experimental model peach peeling machine, or as the date at which it occurred to him how to build the machine. The fact is that before affiant started work on said machine or planned the machine, there had been substantially completed and installed the long peach peeling table which was built and installed at the Dunkley factory at South Haven by him and under his direction in the summer of 1903, the last supply of lumber being purchased for the construction of said table on August 4, 1903. Affiant fixes this date from the books of Noud Lumber Company. That it required some time after this date to complete the table which, with a filling table built in connection therewith, was 210 feet long. A photograph of the "hand peeling table" 150 feet in length is hereto attached marked Exhibit "D" and made a part hereof. A photograph of the "filling table" 60 feet long is hereto attached marked Exhibit "E" and made a part hereof.

Referring to affiant's testimony in the above-entitled case appearing on page 528 of the record of said case on appeal, in which he testified as follows:

"Q. You have referred to a lye machine; please state the circumstances under which that machine was made and what it was and when it was made.

"A. Well, they had to have a lye machine to lye the peaches for the peeler and about August,

1903, the first experimenting with the lyeing of the peaches [60] was made, and then I conceived the peeler—they wanted a lye machine for lyeing the peaches; Mr. S. J. Dunkley gave me the order to construct a lye-machine so I went to work and made a drawing of the tank after I had figured out the way I wanted it, I made a drawing of the tank and handed it to him to have the tank made of boiler-iron, and he gave the order at Kalamazoo, either gave it or sent it to Kalamazoo.”

affiant did not intend thereby to convey the meaning that said lye tank was made immediately after August, 1903, nor did affiant so state, but on the contrary affiant intended to make it clear (and in other parts of his testimony he is of the opinion that he did so), and he now states the fact to be that the drawings for the first tank were made after the close of the 1903 peach season and after the tryouts of the model machine which were had in October of that year, and an order was thereupon given to the Clark Engine and Boiler Company of Kalamazoo and said first tank was thereafter constructed and was delivered to Dunkley Company about February 1st, 1904.

That affiant recognizes Exhibits “A”, “B” and “C” as photographs of said machine because of many unmistakable peculiarities of construction of said machine, among which are the splices which appear on the lower portions of the supports or legs of said machine; that it was originally intended by affiant to make said machine of less height, but subsequently affiant concluded that the machine should be raised

and the supports were changed by utilizing the braces as indicated in the photographs.

Affiant was a witness in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, and affiant hereby refers to the transcript of his testimony of record in that case, and hereby makes said transcript a part of this affidavit as if fully set forth herein; that affiant will testify in the above [61] entitled causes or any of them in accordance with this affidavit.

STEWART L. CAMPBELL.

Subscribed and sworn to before me this 23d day of February, 1919.

[Seal]

J. L. RANKIN,

Notary Public in and for the County of Alameda,  
State of California.

(Attached hereto are exhibits "A", "B", "C", "D" and "E".)

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Robert H. Clark.**

State of Michigan,

County of Kalamazoo,—ss.

Robert H. Clark, being duly sworn, deposes and says:

That he is now and for many years has been a resident of Kalamazoo, Michigan. From about the 7th or 9th of September, 1904, until 1916, he was the bookkeeper for the Clark Engine & Boiler Co., which



company was started by his father. Exhibit "A" [63] hereunto attached is a true photograph of page 331 of Ledger E of the Clark Engine & Boiler Company, and Exhibit "B" attached hereto is a true photograph of page 432 of the same ledger. These two pages show the ledger account of the Clark Engine & Boiler Company with the Dunkley Company for the years 1903-4. Referring to page 331, the entries on the debt side of the ledger for September 9, September 26 and September 30, 1904, were made by him and are in his handwriting. All of the entries on page 432 of said ledger were made by him and are in his handwriting. When he started as bookkeeper, all invoices, before being sent out, were copied into a letter press invoice book and posted in the ledger, the posting being done the same day. All ledger entries made by him and appearing on pages 331 and 432 of the ledger were based upon such letter press copies of invoices.

Affiant was a witness in the case of Dunkley Co. et al. vs. Pasadena Canning Co. et. al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, giving his testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to his said testimony of record in that case and hereby makes his said testimony, as therein set forth, a part of this affidavit as if fully set forth herein. Affiant will testify in the above-entitled causes or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 as to the facts set forth in this affidavit.

(Signed) ROBERT H. CLARK.

Subscribed and sworn to before me this 8th day of February, 1919.

(Signed) URAL S. ACKER,

[Notarial Seal]

Notary Public in and for the County of Kalamazoo,  
State of Michigan. [64]

(Attached hereto are exhibits "A" and "B".)

Received copy of the within Affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a corporation,  
Plaintiff,  
vs.

CENTRAL CALIFORNIA CANNERS  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

DUNKLEY COMPANY,

vs.

Plaintiff,

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

## [66]

State of Illinois,  
County of Cook,—ss.

Lyman L. Crosthwaite, being first duly sworn, deposes and says: That he is now employed as a proofreader on the "Daily News", published in Chicago, Illinois; that affiant lived in South Haven from the year 1903 to 1906 and was employed as a reporter on the "South Haven Tribune"; that in the course of his employment upon that paper he wrote a series of articles dealing with various industries in the town of "South Haven", and asked permission of S. J. Dunkley to write an article concerning the Dunkley Company factory.

That on or about the first day of October, 1903, affiant went to said canning factory and was referred to William Bruncker, who was instructed to conduct affiant through said factor; that affiant carefully observed and made copious notes upon the various processes and machines which were in use in said factory; that the fruit was received from the wagons on to the north porch where the same was graded and thence delivered into the factory and distributed in crates to women who were seated in chairs upon

platforms at either side of a table about 150 feet long, having in its center an endless moving belt; that the women peeled said peaches by hand or by small hand peeling machines which were attached to the table. As the peaches were peeled they were placed in pans which, after inspection by women inspectors, were dumped upon said conveyor belt and thus conveyed to a table having a moving slat platform where said peaches were filled into cans and thence delivered to the syruper. The peeling table, filling table and syruper were situated on the south side of the main room of the factory, and occupied practically the entire space from one end of the room to the other; that there was no lye peeling machine [67] in operation in the factory at that time, and affiant asserts that had there been such machine in operation when he visited the factory he certainly would have seen it, as he made a very careful investigation of all machines whether in operation or otherwise, and affiant is very positive that all of the peaches were being canned when he visited said factory were peeled by hand and not by the lye process; that after making said observations and notes, affiant wrote an article describing carefully, accurately and in detail all of the machines and processes which he saw at said factory; that said article was entitled "Canning Factory Is a Busy Place"; that in May, 1918, affiant read a copy of said article as it appeared in the issue of the "South Haven Daily Tribune" under date of October 1, 1903, and the reading of said article refreshed his memory as to the date of his visit and as to what he saw upon that occasion.



That affiant testified in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, tried before Judge Trippet in Los Angeles in May-July, 1918, and he refers to the official transcript of his testimony in that case and makes the same a part hereof as if fully set forth herein; that affiant is willing to give testimony as in that case and in accordance with this affidavit either in the above-entitled cause or in any other suit or proceeding involving the validity of letters patent 1,104,175.

(Signed) LYMAN L. CROSTHWAITE.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

(Signed) MINA CAMPBELL,  
Notary Public for and in the County of Cook, State  
of Illinois. [68]

(Attached hereto is exhibit.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

State of Illinois,  
County of Cook,—ss.

L. L. Crosthwaite, being first duly sworn upon  
oath, deposes and says:

I am of lawful age, and a resident of Chicago, Cook County, Illinois.

During the years 1903 and 1904, I was connected with a newspaper known as "The Tribune-Messenger" at South Haven, Michigan, and in April, 1904, wrote an article which appeared in the "Tribune-Messenger" on April 19th, 1904, reprinted in the weekly edition under date of April 22nd, 1904, relating to the installation of two pitting machines and two peeling machines being installed at the Dunkley Canning factory under the supervision of Stewart Campbell, the superintendent. My best recollection and belief is that I secured the information upon which this article was based, from Samuel J. Dunkley.

I have examined the files of the weekly "Tribune-Messenger" for 1904 and there is no other reference to said machines in said paper, and no subsequent denial or modification of the facts as stated in the article of April 19th and 22nd, 1904.

I have also examined the issue of the "Tribune-Messenger" for June 17th, 1904, and the attached photograph shows a true copy of an article which appeared in the South Haven, Michigan, "Tribune-Messenger" under date of Friday, June 17th, 1904, referring to my connection with the paper for more than a year [70] prior to that date. The article appears at the top of the first column on page two, this page being folded back (but not detached), so as to show the heading of the paper and the date.

And further the affiant saith not.

(Signed) L. L. CROSTHWAITE.

Subscribed and sworn to before me, a notary public in and for Cook County, this 11th day of February, day of 1919.

(Signed) LOUISE E. SMITH,

[Seal]

Notary Public.

My commission expires Feb. 1, 1922.

(Attached hereto are exhibits.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Malíng,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,

vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Martin H. De Loof.**

State of Michigan,  
County of Van Buren,—ss.

Martin H. De Loof, being first duly sworn, [72] deposes and says that he was in the employ of Dunkley Company from August, 1898, until May, 1909, as timekeeper and bookkeeper; that until the year 1905 he acted as timekeeper and was in charge of the pay-rolls for said company, and subsequent to that time he acted as bookkeeper and was in charge of the books; that after the bankruptcy of said Dunkley Company of Illinois and the reorganization of the assets of said concern under the control of a new corporation then formed, to wit, Dunkley Company of Michigan, affiant became one of the directors of said last mentioned corporation, being associated with S. J. Dunkley, Melville Dunkley, Fred Llewellyn and others in said concern.

That during the canning seasons of 1901, 1902, 1903 and 1904, affiant was employed at the Dunkley Company factory at South Haven as timekeeper and in charge of the pay-rolls; that during the peach season of 1903, affiant lived at the South Haven factory in a room at the east end of the building, and that his office was in the basement of the north wing of the factory building and that in going to and from said room and office and in his capacity as timekeeper,



he went many times each day through the main fruit room where the peaches were peeled and canned; that affiant is positive that there was no lye peach peeling machine in operation in said factory during the peach season of 1903; that the first lye peach peeling machine which was used commercially in the Dunkley factory at South Haven was installed and used in 1904; that affiant fixes these dates by many circumstances, among which are the following:

That affiant was married early in 1905 and the previous [73] year was the last year during which he was employed at the South Haven factory, and the peach peeler was installed the last season affiant worked there; and also that the pay-rolls indicated a change in the method of peeling peaches in the season of 1904, in that the peeling of peaches by hand was paid for "by the piece", while after the lye peach peeler was installed, in 1904, there were few, if any, piece workers, the work of the women in inspecting and trimming the fruit being paid for by the hour; and that the entries upon the pay-rolls plainly indicate the different classes of work done by the employes; that the pay-rolls show that during the peach season of 1903 there was as large a percentage of piece workers, for instance, hand peelers, as in the previous season of 1902, or larger, while in the season of 1904 there were scarcely any piece workers; that affiant also recalls that during the peach season of 1904 the peeling of peaches by hand was confined to a small quantity of soft fruit which could not be peeled by the brush machine.

That in the spring of 1903 affiant went on the road

as salesman for Dunkley Company, selling canned peaches and other fruits; that it was then a matter of common knowledge among the trade that peaches were being peeled in California by the lye process; that affiant in selling canned peaches as a salesman for Dunkley Company as aforesaid made a practice of assuring prospective purchasers of said goods that Dunkley Company canned only high grade goods which were peeled by hand and did not use lye or poison in the preparation of its canned goods.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers [74] to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

That affiant has also testified by deposition in the case of Dunkley Company vs. California Packing Corporation. United States District Court for the Southern District of New York, Equity 15-98, and affiant refers to said deposition and exhibits thereto attached, and hereby makes the same a part hereof as if fully set forth herein.

(Signed) MARTIN H. DE LOOF.

Subscribed and sworn to before me this twelfth day of December, A. D. 1918.

[Notarial Seal]

(Signed) R. S. McGOWAN,  
Notary Public in and for County of Van Buren,  
State of Michigan.

My Commission expires Feb. 4th, 1922.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant,

## IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Charles De Pue.** [76]

State of Wyoming,  
County of,—ss.

Charles De Pue, being first duly sworn, deposes and says: That he is now in the employ of the Continental Oil Company at Casper, Wyoming; that affiant was employed by the Dunkley Company at its factory at South Haven, during the peach seasons of 1903 and 1904 in the making of syrups; that during the peach season of 1903, no peaches were peeled by lye in commercial quantities in the Dunkley Company factory at South Haven, and the 1904 peach season was the earliest date at which a lye peach peeling machine was installed for commercial use, and that only one such machine was installed or operated during the season of 1904.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit, in any or all of the above-entitled causes and in any other suit or proceed-



ing in which the same or similar issues are involved.

(Signed) CHAS. DE PUE.

Subscribed and sworn to before me this 29th day  
of November, A. D. 1918.

(Signed) A. E. THOMPSON,

Notary Public in and for said County of *Natrona*,  
State of Wyoming.

[Notary Seal]

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and

W. A. RICHARDSON,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,

Plaintiffs,

vs.

CENTRAL CALIFORNIA CANNERIES

COMPANY,

Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.                      Defendant.

DUNKLEY COMPANY, Plaintiff,  
vs.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,  
Defendant.

### Affidavit of Mrs. Charles De Pue.

State of Michigan,  
County of *Kalamazoo*,—ss.

Mrs. Charles De Pue, being first duly sworn, deposes and says that she resides at Kalamazoo, Michigan, and that prior to the present year, was employed by Dunkley Company in seasonal occupations throughout a period of about twenty years; that in the year 1902 she worked during the "small fruit" (berries, etc.) season in South Haven, and in the "large fruit" (peaches and pears) season at Hartford, Michigan. That in the small fruit season of 1903, affiant worked in the Kalamazoo factory of Dunkley Company, and in the peach and pear season she worked at the South Haven factory; that affiant fixes the date of her employment at South Haven during the peach season of 1903 by the fact that she was only employed there during one peach season, and that just prior to said season she was compelled to go to the hospital and sub-

mit to an operation, and she still has in her possession and is able to produce the receipted bills covering hospital and physicians' charges.

That during the peach season of 1903, affiant had no regular employment, but was assigned to various special work, and was favored on account of her illness, occasionally acting as inspectress or checker in charge of some of the women who were peeling peaches by hand at the long peeling table; that affiant's duties carried her to all parts of the main room in the factory, and that at no time during the season of 1903 were peaches peeled commercially by the lye process, or by any kind of lye machine; that some time in October, 1903, Miss Carrie Wing (now Mrs. Easterbrook) handed to affiant a pan of peaches which had been peeled by the lye process and instructed her to pit them, and that they were very smooth and slippery and not corrugated as in the case of peaches peeled by hand or by the hand peeling machines; and that affiant saw no other and no more lye peeled peaches than said one panful at the Dunkley factory at South Haven or elsewhere during said peach season of 1903. [79]

That during the peach season of 1904, affiant was employed as forelady in the Hartford factory of Dunkley Company, and the entire peach pack in that factory was peeled by hand and hand peeling machines; that a considerable quantity of soft peaches were sent to Hartford from South Haven during that season because the brush peeling machines tore and destroyed the soft fruit; that during said season of 1904 affiant visited the South Haven factory of Dunkley Company

and there saw them for the first time peeling peaches commercially by the lye process.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. CHAS. De PUE.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

(Signed) FRANKIE M. KENNEDY,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

[Notarial Seal]

My Commission Expires Oct. 25th, 1921.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [80]



In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,                      Defendant.

**Affidavit of Clyde M. Funk.**

State of Michigan,  
County of Kalamazoo,—ss.

Clyde M. Funk, being duly sworn, deposes and says:

That he is now and for many years has been a resident of Kalamazoo, Michigan. For above six years he has been bookkeeper for the Clark Engine & Boiler Company there, and has in his custody all the books and records of the company. He has made

various searches among the old books and papers of the company for entries showing dealings between the Clark Engine & Boiler Company and the Dunkley Company in the years 1903-4. Sometimes these searches [81] were made at the instance of the Dunkley Company, and sometimes at the instance of the Pasadena Canning Company. Ledger E of the Clark Engine & Boiler Company was found in the vaults of the Company. Exhibit "A" is a true photograph of page 331 of this ledger, and Exhibit "B" is a true photograph of page 432 of this ledger. Exhibit "C" is a true photograph of an original order sheet of the Clark Engine & Boiler Company which he found among the papers and records of the company. Exhibit "D" is a true photograph of page 695 of letterpress invoice book No. 7 of the Clark Engine & Boiler Company, which book he found among the papers and records of the Company.

Subsequent to the date at which this affiant testified by deposition, as hereinafter referred to, he delivered to an agent of the Pasadena Canning Co., for use in the trial of the case of Dunkley Co. vs. Pasadena Canning Co., hereinafter referred to, three bound letterpress invoice books Nos. 7, 8 and 9 of the Clark Engine & Boiler Company covering the period from September, 1902 to September, 1904, together with five volumes of order sheets of said company covering the years 1903-4. The order sheets were of the same general character as Exhibit "C", and the invoice books Vols 8 and 9 were of the same general character as invoice book Vol. 7, of page 695 of which Exhibit "D" is a photograph.

Affiant was a witness in the case of Dunkley Co. et al. vs. Pasadena Canning Co. et al., in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, giving his testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to his said testimony of record in that case and hereby makes his said testimony, as therein set forth, a part of this affidavit as if fully set forth herein. Affiant will testify in the above entitled causes or any of them, or in any other suit or proceeding involving the validity of letters patent 1104175 as to the facts set [82] forth in this affidavit.

(Signed) C. M. FUNK.

Subscribed and sworn to before me this 10th day of February, 1919.

[Seal] (Signed) URAL S. ACKER,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

(Attached hereto are exhibits "A", "B", "C", and "D".)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [83]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,  
vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of William A. Geiger.** [84]

State of Illinois,  
County of Cook,—ss.

William A. Geiger, being duly sworn, deposes and says: That he is and for many years last past has been a resident of the City of Chicago, State of Illinois; that he is now associated with the firm of W. H. Miner, dealer in railway supplies with offices in the Rookery Building, Chicago.

That during the year 1904 and prior thereto, affiant was in the employ of Munday, Evarts and Adcock, Patent Attorneys, with offices in Chicago, Illinois, said affiant being employed in the capacity of mechanical draftsman and as such, it was the duty of affiant to make drawings to be used for filing in the patent office in connection with application for patents prosecuted by his said employers.

That affiant made the drawings which accompanied the application of S. J. Dunkley, Serial No. 234715 resulting in Patent No. 1104175; that said drawings prepared by affiant or exact copies thereof, were reproduced and now appear in said Letters Patent.

That affiant is the same William A. Geiger whose signature appears on said drawings as one of the witnesses thereto.

That on or about the 26th day of September, 1904, Edmund Adcock, Esq., a member of the firm of affiant's said employers, in company with others (among them being Edwin Norton and John Hodgson), made a visit to the factory of the Dunkley [85] Company at South Haven, Michigan, for the purpose of seeing in commercial operation a lye peach peeling apparatus and other machines, and that upon the return of said Adcock to his office upon the day following said visit, or soon thereafter, said Adcock instructed affiant to go to said Dunkley factory at South Haven and to make drawings of said lye peach peeling machine for the purpose of an application for patent thereon, as well as to make drawings of certain pitting and cooker machines for similar purposes.

That pursuant to said instruction, affiant on or about

Sunday, the second day of October, 1904, arrived at said Dunkley Company cannery at South Haven and proceeded to make sketches of said lye peach peeling machine, to be later used as a basis for the formal patent drawings. The making of said sketches and the recording of measurements and data for the purposes of said drawings consumed approximately three (3) days of affiant's time, to wit, October 2d, 3d and 4th (Sunday, Monday and Tuesday) and during the whole of one of these days, said lye peach peeling machine was in full operation.

That in the making of said sketches and that in obtaining said data it was necessary for affiant to and affiant did examine said lye peach peeling machine very carefully.

That said machine consisted of

(1) An iron tank about 40" wide and 12 or 14 feet long, provided with a conveyor made of galvanized iron flights [86] mounted on chains, said tank containing a heated lye solution through which the peaches were carried by means of the conveyor for the purpose of disintegrating their skins, the peaches being held down in the solution by a wire screen; and

(2) A brushing apparatus for the removal of the previously disintegrated skin from the fruit, comprising six (6) cylindrical roller brushes arranged in pairs, with a carrier belt disposed longitudinally between and slightly below each of said pair of brushes and also perforated water pipes arranged one above and parallel to each carrier belt and one on either side of each carrier belt and parallel thereto and beneath said cylindrical brushes; and that in operation

peaches were conveyed through said tank of lye and discharged into said brushing apparatus and conveyed through and between the cylindrical brushes and were turned, operated on and cleaned by the action of the rotating cylindrical brushes and by water delivered from said perforated pipes.

That said machine was substantially as represented in the drawings accompanying Letters Patent #1,104,175, issued July 21, 1914 and the drawings shown in the application of S. J. Dunkley for patent on the machine for peeling peaches and other fruit, Serial No. 234715 filed November 29, 1904.

That during the progress of the making of said sketches, affiant noted carefully the disposition of machinery in said factory and the peach peeling and other operations therein.

That affiant now refers to a sketch entitled [87] "Second floor, Dunkley Factory, 1904", said sketch having at the lower right hand corner the following: (L. A. Exhibit 6—for identification) and the same is marked "Exhibit I" and is hereby made a part hereof.

That the said "Exhibit I" fairly represents the location of machines as designated thereon, the location of the lye peach peeling machine referred to being designated on said Exhibit I hereof as "Stewart-Campbell-Lye Machine".

That said second floor was the main operating floor of the factory and the only part thereof where peaches were peeled and canned in commercial quantities.

That the lye peach peeling machine from which affiant made said drawings was the only lye peach peeling machine installed or in either commercial or experi-



mental operation in the said Dunkley Company South Haven factory on its main floor, during the time affiant was engaged in making drawings of said and other machines at their factory, to wit, October 2d, October 3d, and October 4th of the year 1904.

That there was no other lye peach peeling machine and no other lye tank and no other roller brush machine, located on said second floor or main floor of said Dunkley factory during that time.

That had there been another lye peach peeling machine in operation or another lye peach peeling machine or another lye tank or roller brush machine located in the same room affiant would have seen the same, not only because of the nature of affiant's vocation, but also because his employer, Mr. Adcock, had particularly informed affiant concerning said lye peach [88] peeling machine consisting of a lye tank attached to a roller brush machine, and affiant was therefore especially interested in said device, and in each part thereof, and also for the further reason that the room in which said lye peach peeling machine was situated was very narrow, to wit, not exceeding thirty-two (32) feet in width, and the space therein available for the use, installation or storage of another like machine was exceedingly limited.

That said lye peach peeling machine and all parts thereof had the appearance of being new, that is to say, had apparently been in commercial use but a short time prior to October 2d, 1904.

That at no time during affiant's stay in said factory did any person say to affiant or claim to him that said or any lye peach peeling machine or lye tank or roller



brush machine had been used commercially in said Dunkley Company's factory prior to the peach season of 1904; that, on the contrary, said machine was referred to in substance as a new invention, and that affiant noticed some experimentation and adjustment being done upon said machine by those in charge of it of a nature usually incident to the installation of machines not previously commercially used; that affiant has seen the photograph on page 1122 of Plaintiff's Exhibit "A" in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8 in the United States District Court in and for the Southern District of California, Southern Division, the said photograph being entitled, "Dunkley's Exhibit No. 1, Photograph of Frame of First Dunkley Machine", a copy of which is hereto attached and made a part hereof and [89] marked "Exhibit II"), and that no such machine was located in the same room as the machine referred to by affiant herein during the time affiant was at said factory; that affiant has seen pages 1123, 1124 and 1125 of said Plaintiff's Exhibit "A" in the said Dunkley Company, et al. vs. the Pasadena Canning Company containing therein certain photographs entitled respectively, "Dunkley's Exhibit No. 2, photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, photograph 2 of Second Machine", "Dunkley's Exhibit No. 2, photograph 3 of Second Machine", copies of which said photographs are hereto attached and made a part of this affidavit and respectively marked and designated as Exhibits III, IV and V hereof; that said photographs are true and correct photographs of part of the brush-

ing portion of the machine which was operated on the third, and fourth days of October, 1904, in the Dunkley South Haven factory, and from which affiant made the sketches for the patent drawings as hereinbefore set forth; that affiant is enabled to fix the time at which he made said sketches at the Dunkley factory by memoranda contained in a memorandum book and also by entries in an account book, said entries and memoranda having been made and written by himself at the time herein referred to and covering the items of his expenditures and his employment in connection with the making of the said sketches at the South Haven factory.

That in the above-entitled causes or any of them or in other suit or proceeding involving the validity of said [90] Patent No. 1,104,175, affiant is willing to testify as a witness to all of the facts herein set forth.

(Signed) WILLIAM A. GEIGER.

Subscribed and sworn to before me this 3d day of December, A. D. 1918.

(Signed) MINA CAMPBELL,

[Notarial Seal]

Notary Public in and for the County of Cook, State of Illinois.

(Attached hereto are exhibits 1, 2, 3, 4 and 5.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of G. E. Grier.**

State of California,  
County of Los Angeles,—ss.

G. E. Grier, being first duly sworn, deposes and says: That he is the G. E. Grier who is one of the defendants in the suit entitled Dunkley Company and Michigan Canning & Machinery Company, Plaintiffs, vs. Pasadena Canning Company and G. E. Grier,

Defendants, No. Equity C-8, in the United States District Court, [92] Southern District of California, and in which a decree has been rendered in favor of the defendants therein, and against plaintiffs, adjudging and decreeing the patent sued on herein, to wit, Patent No. 1,104,175, to be null and void.

That affiant gave testimony in the trial of the above-entitled causes and in said case of Dunkley et al. vs. Pasadena Canning Company, et al., and affiant refers to the transcript of said testimony and hereby makes same a part hereof as if fully set forth herein; and affiant is willing to testify in like manner, and in accordance with this affidavit, in any proceeding in the above-entitled causes, or in any action or proceeding in which the validity of Letters Patent No. 1,104,175 is or may be involved.

That in April, 1903, affiant commenced the building of two commercial lye peach peeling machines identical in construction, and completed the same some time in July, 1903; that photographs of one of said machines appear in the transcript of evidence taken in the above-entitled causes and are designated therein as Defendants' Exhibits "B" 1 to 8, the original of one of said machines being introduced therein as Defendants' Exhibit "K" and introduced in said Pasadena Canning Company case as Defendants' Exhibit 9.

That one of said machines was delivered to East Side Canning Company, Los Angeles, E. A. Taylor, proprietor, on or before July 30, 1903, and the other of said machines was, on or before that time, put in commercial operation in the plant of Pasadena Canning Company at Pasadena, California, in the com-



mercial peeling of peaches in connection with the lye process, and thereafter so used continuously during the entire peach season of 1903 and that from and after the installation of said machine by Pasadena Canning Company, *all* of the peaches packed by Pasadena Canning Company were so peeled by means of said apparatus with the exception of a very insignificant quantity. [93]

That the reason why affiant did not apply for a patent upon said device was that he did not consider the device patentable, for the reason that the peeling of peaches by lye was old, and affiant's device consisted merely of a "grasshopper" scalding (an already patented apparatus) and a spray washer, which was a device in universal use for washing purposes.

That prior to the issuance of Dunkley's patent 1,104,175, to wit, as early as the year 1907, affiant realized that any machine utilizing water sprays under heavy pressure for the removal of previously disintegrated peeling from peaches was defective and objectionable for the reason that the effect of the operation of such sprays upon ripe or soft fruit is to tear, injure and otherwise destroy the fruit and to waste a considerable portion of it, and that as early as the year 1909 affiant by experiment discovered that the disintegrated peeling could be removed by means other than the spray, and on or about said time he conceived the principle of the machine which he subsequently patented under Letters Patent 1,168,799; that by reason of the gentle handling of the fruit in affiant's said new machine, now known as the "Pasadena Washer", a considerable saving in fruit is effected, to wit, thirty

to three hundred pounds per ton, a sufficient quantity for twenty four to two hundred forty cans on the average for each ton processed; that the quantity saved varies with the condition of the fruit; that if the fruit is very ripe and soft, fruit can be successfully handled through said new machine which would be totally destroyed by the spray device; that the foregoing facts can easily be demonstrated by running through both types of machines a quantity of ordinary soft canned peaches.

That in the use of the term "relative flow" in affiant's application for patent on his last mentioned machine, affiant did not intend to indicate a jet action or anything more or [94] other than what actually occurs in the operation of said machine when the buckets are being revolved at from ten to twelve revolutions a minute; that in the actual operation of said machine that halved peaches do not immediately sink to the bottom of the tank upon being deposited therein but a considerable portion of them remain more or less suspended until engaged by the next approaching bucket and that as soon as sufficient peaches are gathered into the bucket to cover the perforations in the lower part thereof there is a tendency to push or lift the water in the compartment ahead of the revolving bucket, some of the water being dumped with the peaches into the next adjoining compartment and some escaping from above the peaches out, over or through the sides of the buckets; that the proportionate amount or volume of water which escapes through the interstices between the peaches and through the perforations in the bottom of the bucket is slight as compared

with the water otherwise disposed of as just related; that by reason of the said lifting of the water by the buckets above and ahead of the fruit within them no jet or spray action is possible in affiant's machine; that by no possible method of operation of said machine can a spray or jet of water be directed against the peaches in such a manner as to peel the peaches; that the position of the intakes on said machine is merely a matter of convenience to affiant and not for any purpose of utilizing the intake as a jet for removing the peeling from peaches and this is demonstrated by the fact that there are other machines of exactly the same type in successful operation in various places in California having intakes so positioned that it would be impossible for the water to strike the fruit regardless of the method of operation of the machine, to wit: Sunset Canning Company has in successful operation at its factory at Pomona, California, two machines for peeling peaches, said machines having no jets or sprays; that in each of said [95] machines the intake is situated in the corner of the tank, the water being so directed that it is impossible for the water to strike the revolving buckets or the fruit; that in the factory of the Pomona Valley Canning Company at Pomona said company has in successful operation for peeling peaches a "Pasadena Washer" which operates without jets or sprays and which has its water intake in the bottom of the tank and under water eight or ten inches deep, and so positioned that no jet action upon the fruit is possible; that affiant annexes hereto photographs of these and other machines made under his patent all of which peel peaches perfectly and all of

which have intakes so positioned that the water upon entering the tanks cannot strike the fruit, and hereby makes said photographs a part hereof.

That in the operation of said "Pasadena Washer" type of machine there are no jets or sprays of water directed upon the fruit nor is there any jet action or equivalent of jet action of water upon the fruit; that in affiant's opinion the removal of the distintegrated peeling and the cleaning of said fruit is accomplished by a combination of three actions or effects, to wit: First, the action of water as a solvent which is demonstrated by the fact that if a peach with the disintegrated peeling unremoved is placed in a still body of water and allowed to remain there, the solvent action of the water will eventually remove practically all, if not all, of the peeling and leave the fruit clean. Second, the action of the water upon the fruit occasioned by the dropping of the fruit into the water as shown from the fact that if the fruit is properly lyed the peeling will be entirely removed by dropping it about six times into the water from a height of two feet. Third, the gentle laving effect occasioned by the movement of the peaches through the water by means of the revolving buckets, the function of the buckets also being to subject the fruit to the solvent action of new and constantly [96] fresher water and to accomplish the repeated dropping of the fruit into the water in successive compartments.

That affiant also annexes hereto and by this reference makes a part hereof, photographs of the "Schaefer Machine", a patented apparatus for the removal of previously distintegrated peelings from peaches (Pat-



ent No. 1,205,110) a machine on which (as can be seen from said photographs) the water intakes are outside of the perforated conveyor cylinder, and the water is so directed downward as not to strike said cylinder nor the peaches which are conveyed within said cylinder. That many lye peach peeling machines of the Schaefer type are used in California, and same peel peaches successfully without the use of any sprays or jets of water directed upon the fruit whatever.

That affiant has had a long and extensive experience in the peeling of peaches by lye, and in handling solutions of lye for this purpose. That it is the opinion of affiant that an apparatus employing lye for the treatment of peaches, in peeling them commercially, could not be used in a factory room thirty-five feet wide without the knowledge of all persons in said factory room within a radius of one hundred feet, for the reason that in the treatment of peaches by lye a very pungent odor is emitted, and the fumes of the boiling lye permeate the atmosphere for a considerable distance, a fact which can be easily demonstrated by experiment.

That on or about October 1, 1918, at affiant's factory at Pasadena, California, and in the presence of Harry M. Miller, George Coffin, James H. Gilmore, J. A. Wardlaw, E. H. Kennedy, and Kemper B. Campbell, affiant peeled peaches with the original McDermett Lye Peach Peeling Machine, a machine invented by Ida L. and W. R. McDermett, and introduced in the said case of Dunkley and Company et al. vs. Pasadena Canning Company et al., as defendant's Exhibit



43. That in peeling [97] said peaches, good, firm fruit was selected, and about ten pounds, after having been subjected to the lye treatment, and the peeling thereby disintegrated, were placed in the cylinder and revolved in one of the compartments of the tank of said machine, which was partially filled with clear water, thirteen revolutions in sixteen seconds, thereupon the cylinder was removed into the second compartment of clear water, and revolved eight revolutions in ten seconds; thereupon the cylinder was opened and the peaches removed. The peaches were perfectly peeled. Two other similar experiments were made and with the same result. Affiant annexes hereto and makes a part hereof photographs showing the results of said experiments with said McDermett machine, and the fruit which was peeled in said experiments. That, like the spray machine, said machine as constructed is not perfectly adaptable to the peeling of very soft fruit, but for firm fruit the machine is suitable and peels the fruit successfully. The inside of the cylinder marks the fruit slightly, but not more than is done in knife peeling, and these marks practically disappear when the fruit is cooked, and the same is a marketable product.

That affiant has seen and is familiar with the so-called Pyle lye peach peeling machine which was introduced in evidence in said Pasadena Canning Company case as defendants' Exhibit 72, said machine now being in custody of affiant, under the order of the Court; that affiant has examined and is familiar with the shaker portion of said machine known as the Anderson Shaker and Grader; that in affiant's opinion said

shaker or oscillating table would operate as a means of turning the fruit over and advancing it; that affiant has in his factory a shaking table which operates with the same oscillating motion and which is designed for and performs perfectly the function of turning halved peaches over for the purpose of feeding them uniformly into a slicing device; that such tables are of standard construction and sold commercially for that [98] purpose, the machines being manufactured by Anderson-Barngrover Manufacturing Company of San Jose; that whole peaches could also be perfectly peeled by the so-called Pyle lye peach peeling machine.

That in the use of lye for peeling peaches the disintegrated peeling either floats to the surface or is held in suspension in the water, the saturated lye solution having a tendency to occupy the lower portion of the tank. That a circular pocket in the bottom of a lye tank such as the Dunkley patent drawings disclose would not be indicated or shown desirable by experiment or in practice, for the collection of disintegrated peeling, for the reason that such peeling would not be deposited therein, a fact which can easily be demonstrated by observing a lye machine of that type in operation.

That on or about the 28th day of November, 1917, affiant received from W. R. Roach a letter, of which the following is a copy:

“NATIONAL CANNERS ASSOCIATION.

Office of Secretary,

1739 H St., N. W., Washington, D. C.

November 22, 1917.

Mr. G. E. Grier,  
Pasadena Canning Co.,  
Pasadena, Cal.

My dear Mr. Grier:

I noticed by publication in the trade papers that Mr. Dunkley has again cleaned up on the peach packers in California covering his alleged patent lye peeling machine. To my mind this is an outrage, for he actually stole the process.

Years ago Mr. Dunkley was a painter. On one occasion he painted a house in Kalamazoo for a friend of mine, Mr. A. S. White, who formerly lived at Hart and whose earlier home was in Northern New York near the same locality where I was born and raised.

Mr. White told me on one occasion that Mr. Dunkley painted his house very well for him and he became more or less interested in him. A few years after that he met Mr. Dunkley and Mr. Dunkley told **him** **he** had gone into the canned **goods** business—had been packing some very fine peaches, had been to New York and secured some fine orders, that his customers wondered why he had not come around before with his products and that they [99] were very much taken with them. Mr. White told me he said to him at that time that he should use the lye process—that Mr. Chas. Seager, who at that time owned the small canning factory at Hart, had been

using very successfully. Mr. Seager was my predecessor in business. My partner, Mr. R. P. Scott, of the Chisholm-Scott Company, bought out Mr. Seager's packing interests in the fall of 1901 and we operated the Hart plant in 1902 on peas, corn, lima beans, and peaches, and at that time we used the lye method quite considerably.

Our method was to pit the peaches in the usual way, put them in a receptacle and dip them into the boiling lye solution, either spraying them off with a hose or otherwise. One method we used was to spray them on a moving belt with a spray from the hose. Another method was to spray them on a continuous revolving squirrel cage, the peaches passing through the squirrel cage automatically, being gravically inclined, the spray coming from overhead from a perforated pipe.

I don't think Mr. Dunkley has any right whatever to the method. *Mr.* predecessor, Mr. C. R. Seager, used the method for many years at Hart, Michigan. Several gentlemen that worked for me during the early stages of our business can substantiate what I have said. I could get them to give their testimony in Hart any time. I shall be glad to hear from you on the subject. Write me at Hart, Michigan.

With kindest personal regards, I am

Very truly yours,

(Signed) W. R. ROACH."

That said letter was, on or about January 1st, 1918, delivered to Kemper B. Campbell, now one of the attorneys in the above-entitled causes. That said Kemper B. Campbell on a trip made to Michigan



during the months of February and March, 1918, for the purpose of investigating the evidence relative to the subject-matter involved in the cause of Dunkley Company et al. vs. Pasadena Canning Company et al. investigated the facts set forth in said letter. That as a result of said investigation witnesses were produced at the trial of said cause of Dunkley Company et al. vs. Pasadena Canning Company et al. who were familiar with the use by W. R. Roach of a revolving squirrel cage machine for the purpose of peeling peaches and evidence of such use was presented in said cause.

(Signed) G. E. GRIER.

Subscribed and sworn to before me this 16th day of February, 1919.

[Seal]

C. L. BAGLEY,

Notary Public in and for the County of Los Angeles,  
State of California. [100]

Exhibits "A", "B", "C", "D", and "E" attached.  
Pasadena Washer, Exhibit "A";  
Schaefer Machine at Bonner Fruit Co., Exhibit "B";  
Three Schaefer machines at San Antonio Growers'  
Assn., Exhibit "C";  
Pasadena Washer at Pomona Valley Canning Co.,  
Exhibit "D";  
Two Pasadena Washers at Sunset Canning Co., Ex-  
hibit "E".

Received copy of the within affidavit this 18th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.



[Endorsed]: Filed Feb. 18, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [101]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of George Harold.**      [102]

State of Michigan,  
County of Van Buren,—ss.

George Harold, being first duly sworn, deposes and says: That he was first employed at the Dunkley factory in South Haven in the year 1904, and did various kinds of mechanical work; that in the month of June or July, 1904, affiant installed water pipes

to supply a new lye peeling machine; that the photographs hereto attached and which are marked Exhibits "A", "B", and "C" are true and correct photographs of the brush part of said machine which was set up for the first time and operated on peaches in the summer of 1904; that there was but one peach-peeling machine installed in operation at the Dunkley factory at South Haven during the season of 1904; that the two line cast-iron frame machines were installed in 1905.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit, in any or all of the above-entitled causes and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) GEO. HAROLD.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for said County of Van Buren,  
State of Mich.

My commission expires Sept. 22, 1919. [103]

(Attached hereto are exhibits "A", "B" and "C".)

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [104]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.



**Affidavit of Mrs. George Harold.**

State of Michigan,

County of Van Buren,—ss.

Mrs. George Harold, being first duly sworn, [105] deposes and says that she has lived in South Haven since 1903; that she worked for Dunkley Company, at South Haven, from 1901 to 1905, inclusive; that in 1903 she worked at the long hand peeling table, peeling peaches by hand; that during said peach season of 1903 all peaches canned at the Dunkley South Haven factory were peeled by hand or by the little rotary hand machines; that she pitted no lye peeled peaches and saw none pitted by any one else during said season of 1903; that there was no lye peach peeling machine operated commercially in said factory during the season of 1903.

That in the season of 1904 affiant was employed as inspectress at one of the inspection tables upon which the fruit was discharged after coming from the lye peeling machine, which was for the first time installed immediately prior to the peach season of 1904; that practically all of the peaches packed during the season of 1904 were peeled by this first commercial lye peeling machine, which was newly built and newly installed that year and was the only peach peeling machine operated during that season.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division,

and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all [106] of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. GEORGE HAROLD.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [107]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Cor-  
Defendant. [108]

**Affidavit of John Hetherington.**

State of Michigan,  
County of Wayne,—ss.

John Hetherington, being first duly sworn, deposes and says: That he lives at 14 Highland Avenue, Highland Park, Detroit, Michigan, and has been a resident of the State of Michigan for many years; that he is employed by the Cadillac Company as an

expert machinist; that he worked for Dunkley Company from about the last of August, 1904, until the month of November, 1905; that he installed the Dunkley pitting machines in the Dunkley Company factory at South Haven and had charge of them during the 1904 peach season, and also did repair work on the first commercial lye peach peeling machine which was installed in the year 1904; the only one lye peach peeling machine was located on the main floor of the factory during the season of 1904, and only one lye peeling machine was operated commercially during the 1904 peach season; that said machine was new and had never been used prior to the peach season of 1904; that said machine consisted of a lye tank attached to a three-line roller brush machine, and there was no other lye tank and no other roller brush machine on said main floor of the Dunkley factory during said year 1904; that affiant has seen photographs as represented on pages 1123, 1124 and 1125 of Plaintiff's Exhibit "A" in said case of Dunkley Company et al. vs. Pasadena Canning Company et al., entitled "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine" and Dunkley's Exhibit No. 2, Photograph 3 of Second Machine respectively, copies of which said photographs are hereto annexed and marked respectively Exhibits "A", "B" and "C" hereof.

And affiant has also seen pages 476, 477 and 478 of a copy of Patent Appeal Docket 790 (Interference No. 30,610), said pages containing photographs entitled respectively [109] "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Ex-



hibit No. 2, Photograph 2 of Second Machine" and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine"; that said photographs represent the brush part of said machine only and do not include the lye tank; that the sketch of floor plan entitled "Second Floor Dunkley Factory 1904" (L. A. Exhibit 6—for indentification) attached hereto and marked "Exhibit D" hereof is a fair representation of the dimensions of said factory and of the location of machinery in the main factory room during the peach season of 1904; that said brush machine had a frame made of wood; that in the spring of 1905 additional brush machines were made having iron frames, and affiant did a great deal of the work in assembling, setting up, fitting and adjusting these machines; that affiant fixes the date of his employment at South Haven by written documents, among them being the date upon a Masonic emblem given to affiant upon his induction into South Haven Lodge, A. F. & A. M.

That affiant was a witness in said case of Dunkley Company et al. vs. Pasadena Canning Company et al., and testified therein; and affiant hereby refers to the transcript of his testimony of record in that case, and hereby makes said transcript, a part of this affidavit as if fully set forth herein; that affiant will testify in the above-entitled causes, or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 to the facts as set forth in this affidavit.

(Signed) JOHN HETHERINGTON.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal] (Signed) J. H. GOLDIE,  
Notary Public in and for the County of Wayne,  
State of Michigan.

My commission expires March 6, 1921. [110]  
(Attached hereto are exhibits "A", "B", "C" and  
"D".)

Received copy of the within affidavit this 17th  
day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Supplemental Affidavit of John Hetherington.**

State of Michigan,  
County of Wayne,—ss.

John Hetherington, being first duly sworn, deposes and says: That he is the same John Hetherington who made affidavit in the above-entitled causes on the 29th day of November, 1918, before one J. H. Goldie, a notary public in and for the county of Wayne, State of Michigan, and this affidavit is made by affiant supplementary thereto and explanatory thereof.

That the photographs, copies of which are annexed to affiant's said affidavit of November 29th, 1918, and marked Exhibits "A", [112] "B", and "C", thereof, are true and correct photographs of the brush part of the peach peeling machine which was installed in 1904 in the Dunkley factory at South Haven, prior to the peach season of that year, and which was first used for the peeling of peaches during said peach season.

(Signed) JOHN HETHERINGTON.

Subscribed and sworn to before me this 7th day of February, 1919.

[Seal] (Signed) EUGENE B. THIBAUT,  
Notary Public in and for the County of Wayne,  
State of Michigan.

My commission expires May 5, 1920.

(Attached hereto are photographic exhibits "A",  
"B", and "C".)

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [113]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.



IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of William A. Hinderliter.**

State of California,  
County of Los Angeles,—ss.

William A. Hinderliter, being first duly sworn, deposes and says: That he resides in the City of Los Angeles, State of California, at 228 South Grand Avenue; that he resided in the city of South Haven, Michigan, from 1900 to 1913; that he was [114] employed in the cannery of the Dunkley Company at South Haven part of the season of 1901 and during the season of 1902, and during the years 1903 and 1904 was frequently in said cannery, his wife being employed there during the seasons of 1903 and 1904; that in the year 1902 affiant worked all over the cannery building at various times, but his main work was in back of the large cooker, where the cans came out after they were cooked, his duties being to test the cans. That during said year of 1902 there was no machine used to peel peaches at said cannery, nor was there any experimental or model machine constructed at said cannery.

That in the year 1903 all peaches peeled at said cannery were peeled by hand or with small hand machines; that in the peach season of 1903 a small machine was constructed by Stewart Campbell, which machine was for the purpose of peeling peaches; that this model machine, as affiant recalls, was down near the engine-room where Fred Brown, the engineer, worked; that in the peach season of 1904 a larger machine was used to peel peaches at said cannery, this larger machine being constructed with three runways for the peaches, with three pairs of brushes.

That affiant did not work for the Dunkleys at their said cannery after the year 1902 but was employed as a night watchman in South Haven and during the daytime frequently visited said cannery, as aforesaid.

That affiant is ready and willing to testify to the foregoing facts in the above-entitled causes or in any of them, or in any other cause in which the same or similar issues may be involved.

WILLIAM A. HINTERLITER.

Subscribed and sworn to before me this 23d day of February, 1919.

[Seal]

O. L. BAGLEY,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Mary Z. Hinderliter.**

State of California,  
County of Los Angeles,—ss.

Mary Z. Hinderliter, being first duly sworn, deposes and says: That she is the wife of Mr. William A. Hinderliter, and resides at 228 South Grand Avenue, Los Angeles, California; that she resided in the City of South Haven, Michigan, from 1900 to 1913; that she was employed by the Dunkley Com-



pany at their cannery in South Haven in the years 1903 and 1904; that in the year [116] 1903 at said factory a long table was made for the women to sit at while peeling peaches by hand. This table was about one hundred fifty feet long and was used during the peach season of 1903.

That affiant worked at said factory in 1903 at the filling table which was also put in new that year and was a table with slat conveyor top about sixty feet in length. Photographs of said "peeling table" and of said "filling table" are annexed hereto, marked, respectively, Exhibits "A" and "B" and are hereby made a part hereof. That a machine was not used to peel peaches in said factory in the year 1903 and no peaches were peeled by means of a lye peeling process during the year 1903 for the market, but, on the contrary, all peaches were peeled by hand or with small hand machines; that had a machine been used to peel peaches commercially in said factory during 1903 affiant would have observed it, as she was in a position to do so.

That during the summer of 1904 affiant worked at said factory and during the said summer half of said long table was cut away and removed and a machine installed to peel peaches; that affiant worked at said factory during the fall of 1904 and during said fall in the peach season said machine so installed was used to peel peaches; that said machine had three runways for peaches and was equipped with brushes, three pairs of brushes, as affiant recalls.

That only one machine was used during the season of 1904 to peel peaches at said cannery; that affiant

fixes the year 1904 as the year in which said machine was used to peel peaches at said cannery from the fact that said machine was used during the last season that affiant worked there, and the season of 1904 was the last season that affiant worked at said cannery, and from the fact that 1903 was the first year affiant worked at said factory and all peaches were peeled by hand at said factory during that year. [117]

That affiant's husband, William A. Hinderliter, worked at said cannery part of the season of 1901 and in the season of 1902.

That affiant is willing to testify to the foregoing facts in the above-entitled causes or any of them, or in any other cause in which the same or similar issues may be involved.

MARY Z. HINTERLITER.

Subscribed and sworn to before me this 23d day of February, 1919.

[Seal]

C. L. BAGLEY,

Notary Public in and for the County of Los Angeles,  
State of California.

Attached hereto are exhibits "A" and "B".

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [118]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of John Hodgson.**

[119]

State of Illinois,

County of Cook,—ss.

John Hodgson, being first duly sworn deposes and says: That he has and for a number of years last past has been consulting engineer for the American Can Company, and resides at Maywood, Illinois; that

prior to the formation of said American Can Company in 1901 affiant was associated in business with Edwin Norton and Norton Brothers in the manufacture of cans and can-making devices; that upon the invitation of said Edwin Norton affiant, in company with Edwin Norton, L. A. Norton, T. A. Assman and Mr. Adcock of the firm of Munday, Evarts & Adcock, patent attorneys, made a trip of inspection to the South Haven factory of Dunkley Company on September 26, 1904, to see certain canning machinery there in operation, including, among other devices, a new lye peach peeling machine consisting of lye tank and brushing apparatus; that on said the 26th day of September, 1904, there was only one of said lye peeling machines in the main fruit room of said factory, and the same was apparently new; that said trip of inspection was the only visit affiant saw the lye peach peeling machine at Dunkley Company's said South Haven factory.

That affiant is willing to testify to the facts herein stated in accordance with this affidavit in the above-entitled causes, or in any other suit or proceeding in which the same or similar issues are involved.

JOHN G. HODGSON.

Subscribed and sworn to before me this 18th day of February, 1919.

[Seal] (Signed) LESLIE E. BINCH,  
Notary Public in and for the County of Cook, State of Illinois.

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [120]



In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of Maud Howes.**

State of Michigan,

County of Kalamazoo,—ss.

Maud Howes, being duly sworn, deposes and says:

That she is now and for many years has been a resident of Kalamazoo, Michigan. At the present time she is employed as stenographer for E. M. Sargeant Coal Co. at Kalamazoo. Between the years 1901 and 1907 she was employed as stenographer and

assistant bookkeeper for the Clark Engine & Boiler Company at Kalamazoo. [121]

The photograph attached hereto and marked Exhibit "A" is a true photograph of page 331 of Ledger E of the Clark Engine & Boiler Company, and the photograph attached hereto and marked Exhibit "B" is a true photograph of page 432 of the same ledger. Referring to page 331 of the ledger (of which Exhibit "A" is a photograph) and in particular the account with the Dunkley Company, she made all of the entries in said account except the entries of May 31, 1904, \$1.50; September 9, 1904, \$22.88; September 26, 1904, \$140.00; September 30, 1904, \$8.71 on the debit side, and the entries of June 5, \$12.92; May 17, \$63.14, and July 16, \$1.50 on the credit side. The entries on page 432 (of which Exhibit "B" is a photograph) are not in her handwriting. The entries were made in the ledger by her directly from a book in which were kept letter-press copies of invoices for goods shipped. These letter-press copies were made as goods were shipped. Exhibit "C" hereunto attached is a correct copy of page 695 of volume 7 of letter-press copies of invoices of said company. In her opinion, she typed the invoice copied on this page of the letter-press book. Referring to the Dunkley account at page 331 of the ledger (Exhibit "A"), the figures appearing in said entry "7/695" refer to book 7 of invoices, page 695, of which page in said book Exhibit "C" is a true photograph.

That affiant was a witness in the case of Dunkley Company et al. v. Pasadena Canning Co. et al., in

the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, giving her testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to her said testimony of record in that case and hereby makes her said testimony, as therein set forth, a part of this affidavit as if fully set forth therein. Affiant will testify in the above entitled causes or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 as to the facts [122] set forth in this affidavit.

(Signed) MAUD HOWES.

Subscribed and sworn to before me this 8th day of February, 1919.

[Notarial Seal]

(Signed) URAL S. ACKER,

Notary Public in and for the County of Kalamazoo,  
State of Michigan.

(Photographic Exhibits "A", "B", and "C", attached.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,

Attys. for Plff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Divison.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Jacob Hycoop.**

State of Michigan,  
County of Kalamazoo,—ss.

Jacob Hycoop, being first duly sworn, deposes  
[124] and says that during the year 1904 he was a  
partner of William Decker and joint proprietor of  
the Kalamazoo Machine and Tool Company, of  
Kalamazoo, Michigan; that as such partner he had  
joint supervision over the business of said Kalamazoo

Machine and Tool Company and the books of account which were kept by Mrs. Dorothy Janashak as book-keeper.

That affiant remembers doing work upon the order of Stewart Campbell during the spring of 1904, upon what Campbell called a "peach peeler"; that during the time that this work was in progress, Stewart Campbell was almost daily in affiant's shop assisting in and supervising said work; that said work was charged in the books of said Decker and Hycoop (Kalamazoo Machine and Tool Company) in the following items, to wit:

1904

Mar.	8.	On Peeler .....	2½	1.00
Mar.	11.	On Peeler .....	4½	1.80
Mar.	12.	On Peeler .....	1½	.60
Mar.	17.	On Peeler .....	1½	.60
Mar.	18.	On Peeler .....	4¾	1.90
Mar.	19.	On Peeler .....	9¼	3.70
Mar.	19.	6 5/16x3/4 S. S.....		.20
Mar.	21.	On Peeler .....	7	2.80
Mar.	29.	On Peeler .....	9¼	3.70
Mar.	30.	On Peeler .....	1½	.60

April 30.

S. Campbell 299.75

J. Courtney 306.45

That affiant is acquainted with Fred Scheid; that said Scheid was employed at affiant's said shop during the time that said peach peeler work was being done there, and assisted thereon.

That the account books herein referred to are now on file as Exhibits "A" and "B", with the depositions

of William H. [125] Decker and Dorothy Janashak in said case of Dunkley Company vs. Pasadena Canning Company, and affiant refers to said books of account and makes the same a part hereof as if fully set out herein or attached hereto.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) JACOB HYCOOP.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

(Signed) MORRIS S. ARNOLD,  
Notary Public in and for County of Kalamazoo, State of Michigan.

My commission expires June 27, 1922.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,                      Defendant.

**Affidavit of Dorothy Janashak.**

State of Michigan,  
County of Kalamazoo,—ss.

Dorothy Janashak, being first duly sworn, deposes and says:

That she is now and for many years has been a resident of Kalamazoo, Michigan. During the years 1903-4 she kept the account books of the Kalamazoo Machine and Tool Company at Kalamazoo. This



was a company in which her brother-in-law, Will Decker, was interested. Entries in the books were made by her directly from time slips. These were handed to her every morning and she made the appropriate entries in the books. During these years considerable work was done by this company for the Dunkley Company. The charges in the books made against this company were paid by it. The entries in said books correctly show the transactions with the Dunkley Company.

Affiant was a witness in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein giving her testimony by deposition taken at Kalamazoo, Michigan, and affiant hereby refers to her said testimony of record in that case and hereby makes her said testimony, as therein set forth, a part of this affidavit as if fully set forth herein. Affiant will testify in the above entitled causes or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 as to the facts set forth in this affidavit.

(Signed) DOROTHY JANASHAK.

Subscribed and sworn to before me this 8th day of February, 1919.

[Notarial Seal]

(Signed) URAL S. ACKER,

Notary Public in and for the County of Kalamazoo,  
State of Michigan.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [128]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Leander Kern.**

State of Michigan,  
County of Kalamazoo,—ss.

Leander Kern, being first duly sworn, deposes and

says that he is now and for several years past has been a resident of Kalamazoo, Michigan; that his vocation is that of stationary engineer; that he was employed by Dunkley Company at Grant, Michigan, 1907, and at the Grant and Kalamazoo factories in 1909; that on or about the 7th day of December, 1909, affiant was sent to the South Haven factory of Dunkley Company for the purpose of preparing the factory for putting up pork and beans and that subsequently, to wit, early [129] in 1910, affiant was in said factory for the purpose of removing machinery, and upon both of said occasions affiant went into the office in said factory and carefully observed the contents of said office and that on neither of said occasions were there any books of account or records in said office.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) LEANDER KERN.

Subscribed and sworn to before me this 10th day of February, 1919.

[Notarial Seal]

(Signed) WM. F. C. DOORNINK.

Notary Public in and for County of Kalamazoo,  
State of Michigan.

My commisison expires July 10, 1919.

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [130]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.



IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY No. 211.

DUNKLEY COMPANY, Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,

vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Mrs. Leander Kern.**

State of Michigan,  
County of *Kalamazoo*,—ss.

Mrs. Leander Kern, being first duly sworn, [131] deposes and says that she is now and for 18 years last past has been a resident of Kalamazoo, Michigan; that in 1901 she was employed as housekeeper at the residence of S. J. Dunkley, in South Haven, Michigan.

That in the fruit season of 1902 she was engaged as forelady, or overseer, of the women who were doing piece work at the factory, said piece work including, during the peach season of 1902, the peeling of peaches by hand and by small Sinclair-Scott hand peeling machines; that the women who were thus engaged peeling peaches, were seated at small tables which were scattered about throughout the main room of the factory on the second floor; that affiant fixes the above dates by her diary of 1901 and also by a letter addressed to her at South Haven in 1902.

That during the peach season of 1902, all of the peaches canned in the South Haven factory were peeled by hand and by said small hand machines; that no peaches were peeled for canning purposes by the lye process during that season. That during the peach season of 1903, affiant was employed at Dunkley Com-

pany's South Haven factory as an inspectress; that it was affiant's duty as such, to have charge of the peeling of peaches and to inspect the same.

That immediately before the peach season of 1903, there was built and installed on the south side of the main room of the factory on the second floor, a table about 150 feet long, mounted upon a heavy raised platform, said table having in its center an endless conveyor belt about twelve inches wide; [132] that said long table took the place of most of the small tables which had been used the previous season, and the women who peeled the peaches were seated on chairs on said platform, on either side of said long table; that all of the peaches peeled commercially for canning purposes during the peach season of 1903, while affiant remained at said factory, were peeled by said women with knives by hand and with the small Sinclair-Scott hand peeling machines, which were mounted upon and attached to said peeling table; that no peaches during said period of time were peeled by the lye process commercially in said factory.

That it was the duty of affiant, in the inspection and supervision of said peeling of peaches, to examine the peaches as they were peeled and after they had been placed by the women in pans on said long table; and it was affiant's duty to empty said pans upon said conveyor belt and to minutely inspect said fruit; that no peaches were pitted at said long table during this period of time which had previously been peeled by the lye process.

That it was also affiant's duty to go out from time to time to the receiving porch, in order that a sufficient

supply of fruit should be arranged for, and in doing so she frequently consulted Mr. Abe Vanderbrook, who was in charge of the receiving and grading of said fruit. That the duties of affiant also carried her to all parts of the fruit room, where the peeling of the fruit and placing of the same in cans was done, and if there had been a peach peeling machine in that [133] room, either in operation or stored there, affiant would have known of it; but affiant asserts that during the period of her employment in the season of 1903 there was no lye peach peeling machine in said fruit room. That Mrs. George K. Brown was also employed in a similar capacity as inspectress during the peach season of 1903.

That affiant recalls the occasion of a picture being taken of said long table, with the women seated at either side of it, during the peach season of 1903; that a copy of said picture is Defendant's Exhibit 3 and 3a in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., tried before Judge Trippet in May-July, 1918; that affiant appears in said photograph standing on the platform on the righthand side of said table, and that Melville E. Dunkley was present when said photograph was taken and instructed affiant to stand up on the platform and be taken in the photograph.

That during the spring and early summer of 1904, affiant worked at the South Haven factory, and there saw Dunkley's first commercial lye peach peeling machine being installed; that said machine was new, and no such machine had been used in the Dunkley factory at South Haven, prior to that time; that the

same was being set up by Stewart Campbell; that the long hand peeling table had been cut in two, one part being located on each side of the room, and remodeled to some extent for use as an inspection table.

(Signed) MRS. LEANDER KERN.

Subscribed and sown to before me this 3d day of December, A. D. 1918.

[Notarial Seal]

(Signed) WM. F. C. DOORNINK,  
Notary Public in and for the County Kalamazoo,  
State of Michigan.

My commission expires July 10, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[134]

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [135]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERS  
COMPANY, Defendant.



IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSELY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of Mrs. Ed. Krugler.**

State of Michigan,

County of *Van Buren*,—ss.

Mrs. Ed. Krugler, being first duly sworn [136] deposes and says that she is now and for many years last past has been a resident of the City of South Haven, State of Michigan; that she was employed in the Dunkley factory in 1902, 1903 and 1904. In the peach season of 1902 and 1903 affiant was employed peeling peaches by hand, and in the year 1903 she was likewise employed peeling peaches by hand at the long hand peeling table which was installed in the summer of 1903; that she pitted no lye peeled peaches and saw none pitted by any one else during said peach season of 1903.

That during the season of 1903 there was no lye peach peeling machine operated commercially in the Dunkley factory, but, on the contrary, all peaches were peeled by hand and by the little hand operated machines; that during the peach season of 1904, peaches were peeled commercially by the lye peach

peeling machine for the first time in said factory; that during said season affiant was employed to inspect the peaches as they came from said peeler.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. ED. KRUGLER.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919. [137]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [138]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant,

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

[139]

State of Michigan,

County of Van Buren,—ss.

**Affidavit of Edwin B. Mapes.**

Edwin B. Mapes, being first duly sworn, deposes and says that he is now and since the year 1901 has been a resident of the City of South Haven, State of Michigan, and during that time has conducted a ma-



chine-shop in the said city; that a model or experimental brush peach peeling machine, without any lye tank was built in the basement of Dunkley Company's factory at South Haven by Stewart Campbell in the fall, of 1903; that affiant furnished some parts for said machine and did some work thereon for which he made charges and recorded them in his account book as follows:

### DUNKLEY CANNING FACTORY.

Page 77.

1903

Sept. 28.	To 2 iron pulleys for peach washer...	\$2.00
Sept. 28.	6 hours' time on peach machine ....	2.40
Sept. 29.	6½ hours' time and 2 lbs of babbits..	3.00
Oct. 1.	1½ hours' time, 2¾ set screws.....	.70
Oct. 1.	Bore 2 pulleys.....	.60
Oct. 3.	Cutting shaft, one hour.....	.40
Oct. 5.	3 hours' time.....	1.20
Oct. 6.	Time on friction, 8 hours.....	3.20
	Leather for friction.....	1.00

That in the month of October, 1903, affiant saw said experimental machine in operation, about a dozen peaches being run through it at that time; that affiant was a witness in the case of Dunkley Company et al. -vs- Pasadena Canning Co. et al, Equity C-8, tried in Los Angeles May-July, 1918, and there was produced in evidence as Defendant's Exhibit No. 11, said experimental model machine, constructed by Stewart Campbell in the year 1903 and affiant identified thereon all parts of the machine furnished by him as afore-said and also [140] identified the frame of said Exhibit No. 11 as the frame of the machine which was con-

structed in the year 1903; that affiant also testified in the case of Dunkley Company -vs- Central California Canneries et al, S. F. 201, and affiant refers to transcript of the testimony given by him in the said Pasadena Canning Company and Central California Canneries Company cases and makes the same a part thereof as fully set forth herein; that affiant is willing, if called upon in the above-entitled causes or any of them or in any other case or proceeding in which the validity of Letters Patent No. 1,104,175 is involved to testify in accordance with the foregoing affidavit.

(Signed) EDWIN B. MAPES.

Subscribed and sworn to before me this 30th day of November, 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,

Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [141]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant,

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of William McEwing.**

State of Michigan,  
County of *Van Buren*,—ss.

William McEwing, being first duly sworn, deposes and says that he has [142] been a resident of South Haven, Michigan for many years, and during most of that time has been engaged in the business of fruit canning; that affiant's cannery is situated a short dis-

tance from where the Dunkley factory stood prior to its destruction by fire; that affiant has used the lye peeling process for removing the skins from peaches for many years; that said process was employed by affiant during the years 1901 and 1902, as well as other years following; affiant fixes these dates of his use of the lye process by invoices, the originals of which were introduced in evidence in the case of Dunkley Company et al. vs. Pasadena Canning Company, et al, being Plaintiff's Exhibit No. 32 1 to 6, tried in the Southern District of California, Southern Division, May-July, 1918, which invoices show the purchase by affiant of lye in quantities sufficient for extensive commercial use of the lye process in peeling peaches; that affiant was one of the appraisers in the estate of Dunkley Company, Bankrupt, in the year 1908, and in that capacity examined everything in the factory, including the contents of the office, and affiant states that there were no books of account of any kind in the factory at that time.

That affiant testified by deposition in the case of Dunkley Company et al. vs. Pasadena Canning Company, et al, Equity C-8, and affiant refers to said deposition and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in any or all of the above-entitled causes and in any other suit or proceeding involving the validity of letters patent 1104175, and that affiant will testify therein in accordance with this affidavit.

(Signed) WILLIAM McEWING.



Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919. [143]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [144]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant,

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Bert McFarland.**                      [145]

State of Michigan,  
County of Van Buren,—ss.

Bert McFarland, being first duly sworn, deposes and says: That he has lived in the City of South Haven for 30 years; that he worked first at the Dunkley factory in September, 1903, and continued during the remainder of that year.

That during the peach season of 1903 he was employed in various lines of work, both mechanical and otherwise; that a greater portion of the time during the peach season of 1903 affiant worked in the main fruit room near the long hand peach peeling table which was installed during the summer of 1903; that affiant widened out or extended the north platform of said table by adding thereto a plank 12 inches wide and 2 inches thick, this for the purpose of facilitating the work of the foreladies, or checkers, who inspected the fruit as peeled by hand and dumped the same from pans upon the central conveyor belt.

In the fall of that year affiant saw the small experimental brush machine in the basement of the factory; that no peaches were peeled by the lye process commercially in the year 1903; that there was no lye peach peeling machine on the main or second floor of the

factory during the year 1903; that the first machine for peeling peaches constructed with lye tank was made and installed during the year 1904; that the same was operated by one William Tierce during the season of 1904; that the experimental model machine which affiant saw in the basement in the fall of 1903 is Defendant's Exhibit "11" in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division.

[146]

That the sketch, or floor plan, entitled "Second Floor Dunkley Factory 1904" hereto attached is a fair and approximate representation of the character and location of machines during the season of 1904 as thereon described; that during the season of 1904 there was but one lye peach peeling machine in the main room or in operation in said Dunkley factory, and the same was located on the south side toward the east end of the main room of said factory.

That affiant testified in the said case of Dunkley Company et al. vs. Pasadena Canning Company et al. Equity C-8, tried before Judge Trippet in May-July, 1918, and he refers to the official transcript of his testimony therein, and hereby makes the same a part hereof as if fully set forth herein.

Affiant also makes the sketch or floor plan attached hereto a part hereof, and designates the same Exhibit "A" of this affidavit.

Affiant will, if called upon, testify to the facts recited herein in accordance herewith in the above entitled causes or any of them, or in any other suit or

proceeding in which the validity of letters patent 1,104,175 is involved, or in which the dates and circumstances of the construction of the said machines may be in issue.

(Signed) BERT McFARLAND.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Attached hereto is Exhibit "A". [147]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [148]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.



IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of John C. Miller.**

State of Alabama,  
County of Mobile,—ss.

John C. Miller, being first duly sworn, deposes and [149] says that his father, D. M. Miller was proprietor of a plumbing business in South Haven, Michigan, and was so engaged until the summer of 1903, and I know that on July 23, 1903, my said father sold and delivered to Dunkley Company, of South Haven, three hundred feet of double beaded galvanized trough; that upon said date the same was charged against Dunkley Company in the books of said plumbing business in the following entry, to wit: "July 23, 1903, 300 feet of double beaded galvanized trough, at 6½ cents a foot, \$19.50." Affiant succeeded his father in said plumbing business and remained in said business for about two years, and now has the books of said business in his possession.

That affiant gave testimony by deposition in the case of Dunkley Company et al vs. Pasadena Canning Company et al, Equity C-8, in the United States

District Court in and for the Southern District of California, Southern Division, and affiant refers to said deposition and hereby makes the same a part hereof as if set forth in full herein.

That affiant is willing to testify again to the same effect, either in the above-entitled causes or in any other cause or proceeding involving the same or similar issues.

JOHN C. MILLER.

Subscribed and sworn to before me this 9th day of December, 1918.

[Seal] ANNIE LOUISE STAATS,  
Notary Public, Mobile County, Ala.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [150]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY,  
Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Mrs. Eleanor Moore.**

State of Michigan,  
County of *Van Buren*,—ss.

[Notary Seal]

Mrs. Eleanor Moore, being first duly sworn, [151] deposes and says that she has lived at South Haven, State of Michigan, practically all of her life; that she is now employed as head of the drygoods department of Hale and Company, in that city; that she worked for Dunkley Company in the South Haven factory during the peach seasons of 1901 to 1905, inclusive; that in the peach season of 1903 she worked on the "filling table," in the room where all of the fruit was peeled and the peaches were placed in the cans, until October 10th.

That all of the peaches canned during that period were peeled by hand and that there was no lye machine used commercially in said South Haven factory during that time; that the first commercial lye peeling



machine was installed in the South Haven factory in the year 1904, and was used for the first time during that season.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al, Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. ELEANOR MOORE.

Subscribed and sworn to before me this 30th day of November, A. D., 1918.

[Notary Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [152]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation.

Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES

COMPANY,

Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,

Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,

Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,

Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,

Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,

Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-

FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of George H. Myhan.**

State of Michigan,  
County of Van Buren,—ss.

George H. Myhan, being first duly sworn, deposes and says that: He has been a resident of South Haven for 54 years [153] and now owns and operates at that place a summer hotel; is also interested in a factory and owns an orchard in that vicinity.

For a period of eight years beginning late in 1903, he was Postmaster at South Haven. In the peach season of 1903 he was employed by S. J. Dunkley to buy peaches, and during the time of that employment was frequently in the Dunkley factory. During the peach season of 1903 he saw the experimental peach peeling machine down in the basement of the Dunkley factory, and affiant saw Stewart Campbell working on said machine; that during the peach season of 1903 there was no lye peeling machine on the main or second floor of the factory; that peaches were not peeled in commercial quantities by the lye process in that factory during that year; that the first commercial lye peeling machine was installed in 1904 and was used commercially for the first time during the peach season of 1904; and that affiant saw the same in operation at that time in said factory.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, tried before Judge Trippet in the Southern District of California in May-July, 1918, and affiant refers to the transcript of record of his testimony taken in that case and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in this case or in any other case or proceeding in which the validity of letters patent No. 1,104,175 or the dates and circumstances of the construction of the Dunkley peach peeling machines are involved.

(Signed) GEORGE H. MYHAN.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919. [154]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [155]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.



IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Charles R. Newton.** [156]

State of Michigan,  
County of Van Buren,—ss.

Charles R. Newton, being first duly sworn deposes and says: That he has lived in South Haven since 1902, and follows the vocation of painter and decorator; that he was employed by Dunkley in the South Haven factory during the peach season of 1902, 1903 and 1904; that it was his duty in the course of said employment to put syrup into the cans after the fruit had been placed in them, and in so doing affiant was enabled to see and observe the appearance of the peaches as the same were handled by him; that there are marked differences in the appearance of lye peeled and hand peeled peaches; that during the year of 1903 no lye peeled peaches were canned in the Dunkley factory in commercial quantities; that during the fall of 1903 affiant saw in the basement of the factory a small experimental machine which was under construction; that there was no lye peeling machine on the main or second floor of the factory during the peach season of 1903; that the first lye tank and the first commercial lye peeling brush machine ever operated at the Dunkley factory were installed in the year 1904 and operated during the peach peeling sea-

son of 1904, and William Triage was in charge of said combined machine during its operation.

That affiant testified in the case of Dunkley Company et al vs. Pasadena Canning Company et al., Equity C-8, tried before Judge Trippet in the Southern District of California in May-July, 1918, and affiant refers to the transcript of his testimony given in that case and hereby makes the same a part hereof as if fully set out herein; that affiant is willing to testify in the above entitled case or in any other cause or proceeding in which the validity of letters patent 1104175 or [157] the dates and circumstances of the construction of the Dunkley peach peeling machines may be involved.

(Signed) CHAS. R. NEWTON.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for Van Buren County, State of Michigan.

My commission expires September 22, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [158]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

**Affidavit of Robert Newton.**

State of Michigan,  
County of Kalamazoo,—ss.

Robert Newton, being first duly sworn, deposes and says that he is a resident of the City of Kalamazoo, State of Michigan, and is employed by the firm of Wheeler and Blaney, Plumbers; that affiant was employed by Dunkley Company at its South Haven factory during the peach season of 1903 and 1904; that



some time during the summer of 1903 affiant saw William Brunker make experiments in treating peaches with caustic soda to disintegrate their skins and in removing the same by hand by the use of brushes and water; that later on in the peach season of 1903, affiant saw Stewart Campbell engaged in constructing the first or experimental model peach peeling machine down in the basement of the factory; that said machine had no lye tank and was about  $3\frac{1}{2}$  feet high, 3 feet wide and 6 feet long; that about the middle or latter part of October, 1903, affiant saw William Brunker and Stewart Campbell trying out said experimental machine in the basement by running a few peaches through it; that affiant testified in the Dunkley-Beekhuis Interference Proceedings that he saw said experimental machine operated in July, 1903; that affiant was mistaken in said testimony and gave said testimony without opportunity for thinking the matter over seriously or of refreshing his recollection; that affiant is now positive that the facts are as herein recited; that in the peach season of 1904 there was operated a large commercial peach peeling machine, consisting of lye tank and brushing apparatus, said lye tank being about 12 feet long, 4 feet wide and 18 inches deep in its deepest part, with a round transverse receptacle across the bottom thereof; and [160] the brushing apparatus being a wooden frame three line machine; that said lye peach peeling machine was the first machine which was ever installed in the Dunkley factory for commercial purposes; that during the peach season of 1903 no lye peach peeling apparatus was used commercially in said factory; that during the

peach season of 1904, Mr. William Tiece was in charge of the operation of said first commercial lye peach peeling machine; that said 1904 machine was built in the early part of that year and was new and had been previously unused when first operated late in the summer of 1904; that the three photographs hereto annexed are copies of photographs of the brush part of said 1904 lye peach peeling machine, the same being marked Exhibits "A", "B" and "C2" respectively and are hereby made a part of this affidavit; that affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, tried before Judge Trippet in Los Angeles in May-July, 1918, and affiant refers to the transcript of said testimony and hereby makes the same a part hereof as if fully set out herein; that affiant is willing to testify in any or all of the above-entitled causes or in any other case or proceeding in which the validity of Letters Patent, dates or circumstances of the making of said lye peach peeling machines may be involved.

(Signed) ROBERT NEWTON.

Subscribed and sworn to before me this 14th day of February, 1919.

(Signed) NORBERT B. WHEELER,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

My commission expires January 15th, 1921.

(Exhibits "A", "B", and "C" same as exhibits attached to George K. Brown affidavit.)

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [161]



ary 12, 1905; as well as that certain letter from O. W. Norton to S. J. Dunkley, dated September 15, 1904; and that the reading of this correspondence has refreshed his recollection on the subject thereof; and

That he went to Kalamazoo to work for the Dunkley Company in the latter part of October or early part of November, 1902, and that he saw no lye tank or roller brush peach peeling machine at the Dunkley factory at Kalamazoo during that year; and

That in the following year, to wit, 1903, a long table erected upon a platform was installed along the south side of the main factory floor of the South Haven plant on which peaches were peeled and pitted by hand, and by small rotary hand machines which were fastened to the table; and that the women were seated at the table on chairs placed on the platform; and that a conveyor belt extended the entire length of the table, and after the peaches were thus peeled and pitted by hand each panful was dumped on to the belt and carried to a long filling table which started at the west end of the peeling table and ran to nearly the west end of the main floor room; and

That the peeling table and filling table *combined* occupied practically the entire south side of the main floor, and

That no rotary brush machine for peeling peaches was installed or operated commercially at the Dunkley factory at South Haven during the peach season of 1903; and

That the printed diagram endorsed at the right hand lower corner in print as follows: (L. A. Exhibit 19—for identification) is approximately a correct



representation of the posi- [163] tion and relative space occupied by the peach peeling table and filling table and syruper on the south side of the main or "second-floor Dunkley factory, 1903"; and that the same is attached hereto and made a part hereof and explanatory of the statements heretofore made in this affidavit on this subject, and

That a model or experimental peach peeling machine without any lye tank was built by Stewart Campbell in the fall of that same year in which the long peach peeling table was installed; and

That the photograph hereto attached and bearing at the bottom thereof the printed endorsement, "Photograph of Dunkley's First Machine (3N L. A., Ex. No. 11; 5N S. F., Ex. No. 10; 4N Int., Ex. No. 1). Conceived and Disclosed August, 1903. Constructed September-October, 1903", is a true and correct photograph of the model or experimental brush peach peeling machine as I remember it which was so constructed in that year; and that some time late in that peach season this model or experimental machine was tried out with peaches which had been immersed in a lye solution, heated in an ordinary receptacle of some kind, and that this experiment and several other similar experiments which were made at or about the same time were successful; and that the brush part of the machine consisted of one carrier belt with brushes on it and two parallel roller brushes which revolved and brushed the peaches as they advanced on the carrier belt; and that a few inches above this carrier belt a perforated water pipe about one inch in diameter, or less, extended the full length of the frame of the machine: and [164]



That during the following year a lye tank was built by the Dunkley Company to be used in treating peaches with a lye solution preparatory to putting them through the brush and spraying machine, and that this is the lye tank referred to in the aforesaid letters of S. J. Dunkley, Edwin Norton, and O. W. Norton, which are dated respectively in the year 1904; and that this was the first lye tank that the Dunkley Company ever used with which to peel peaches by the lye process at its factory at South Haven; and that during this same year, 1904, another brush peeling machine was constructed for the Dunkley Company; and that this machine had three carrier belts and three sets of longitudinal roller brushes, and was intended to have three times the capacity of the model or experimental brush machine and was called an three-line machine; and that this was the first roller brush peach peeling machine for commercial use that was built for the Dunkley Company and installed at its factory in South Haven, or elsewhere; and that this is the brush machine which is referred to in the aforesaid letters of S. J. Dunkley, Edwin Norton, and O. W. Norton, beginning with the letter of S. J. Dunkley to O. W. Norton, dated November 7th, 1903; and the first commercial use of a roller brush peach peeling machine was during the season that Hodgson, Lawrence, Edwin Norton, Assman, and Adcock made an inspection trip to South Haven; and

That, "the lye machine now nearly completed with the rotary cleaner attached", which is mentioned in the letter of S. J. Dunkley to Edwin Norton dated February 10, 1904, was commonly known and re-

ferred to by the Dunkley employees at that time as the "Prevaricator"; and that this is the first complete [165] prevaricator, to wit, rotary brush or peeling machine with lye tank attached, that was ever set up or operated at the Dunkley factory at South Haven; and that the affiant saw this complete machine set up and operated at the Dunkley factory at South Haven in the year 1904; and

That before this prevaricator was installed the aforesaid long peeling table was cut about in half, and that one-half of this table was installed on the north side of the room on the main floor and the other half on the south side of the room; and that the prevaricator or three-line rotary brush machine with lye tank attached was installed on the south side of the room, east of the remaining half of the hand peeling table, with two machines known as the "Campbell pitters" between the east end of the hand peeling table and the delivery end of the rotary brush machine, so as to make a direct line of operation for the peaches from the lye tank into the rotary brush machine, and thence to the Campbell pitters, and thus to the hand peeling table which was transformed into an inspection and trimming table, and then to the filling table, and thence to the syruper; and

That five or six pitting machines of a different type called the Kalamazoo pitters were installed on the north side of the room so as to make another direct line of operation consisting of these Kalamazoo pitters, from which the peaches went to the other half of the hand peeling table which had also been transformed into an inspection and filling table; and that

the diagram which is attached hereto and endorsed in the right hand lower corner (L. A. Exhibit 6—For Identification) is approx- [166] imately a true and correct representation of the second floor “Dunkley factory 1904” as it existed during the peach season of 1904; and that said diagram is attached hereto and made a part of this affidavit; and

That said model or experimental brush machine had a wooden frame, and that said three-line commercial brush machine also had a wooden frame; and

That the following year, to wit, in 1905, the Dunkley Company caused a new type of brush machine to be constructed with an iron frame, and only two carrier belts with only two sets of rotary brushes, and some of these iron frame machines were sold on guarantee subject to successful test to the California Fruit Canners’ Association, and shipped to its plant at Chico, California, and affiant went there as the agent of the Dunkley Company to direct the installation of the same and to supervise the tests and try-outs of the same and that said machines were rejected by the California Fruit Canners’ Association as not as satisfactory as the so-called Beekhuis machine which the California Fruit Canners’ Association was then using, and the installation of which at its Chico factory was completed just before the commencement of the peach season of 1905; and before the completion of the installation of the Dunkley lye tank and roller brush machine; and

That the Dunkley Company had only one lye tank and only two roller brush machines, to wit, the model or experimental machine and the three-line commercial machine, made prior to January, 1905; and

That the first peeling of peaches commercially by the lye process by the Dunkley Company at South Haven was [167] done in the year after the long hand peeling table was installed, and the year after the model or experimental machine was made; and

That the first iron frame machine was made the same year that I went to Chico, California, to install some rotary brush peach peeling machines; and

That the model or experimental brush machine without any lye tank was made the same year that the long hand peeling table was used, and that it was only used experimentally in that year, and that affiant did not see it used otherwise during any year, and that affiant is ready and willing to testify to the truth of the foregoing facts as they have been herein stated by him whenever called upon so to do in the above-entitled case, or otherwise.

(Signed) ARTHUR W. NORTON

Subscribed and sworn to before me this sixth day of December, A. D. 1918.

[Notary Seal]

(Signed) HOWARD D. ADAMS,  
Notary Public.

My commission expires May 1st, 1920. [168]

State of Maryland,  
Baltimore City, Sct. No. 578 N. P.

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, do hereby certify That Howard D. Adams Esquire, before whom the annexed acknowledgment and affidavit was made, and who has hereto subscribed his name, was at the time of so doing, a Notary Public of the State of Maryland, in and for



the City of Baltimore, residing in said City and State, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments, or Proof of Deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 6 day of December, 1918.

[Seal]

(Signed) STEPHEN C. LITTLE,  
Clerk of the Superior Court of Baltimore City.

(Attached hereto are exhibits "A", "B", and "C".)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [169]

---

In the District Court of the United States for the  
Northern District of California.

No. 201.

DUNKLEY COMPANY, Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES, et al,  
Defendants.



**Supplemental Affidavit of Arthur W. Norton.**

County of Baltimore,  
State of Maryland,—ss.

Arthur W. Norton, being duly sworn, deposes and says: That he is the same Arthur W. Norton who made his affidavit in the above entitled action, and sworn to before Howard D. Adams, a notary public, under date of December 6th, 1918, and he makes this affidavit as supplementary thereto; that affiant has examined Patent Appeal Docket No. 790 of the Court of Appeals, District of Columbia, being the record in an appeal from the Commissioner of Patents in Interference, No. 30,610, entitled Samuel J. Dunkley, Appellant, vs. Hermanus A. Beekhuis, and affiant has particularly examined photographs appearing on pages 476, 477 and 478 and which are designated thereon respectively as "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine", and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine"; that said photographs are true and correct photographs of the brush portion of S. J. Dunkley's first commercial peach peeling machine, and that the apparatus represented in said photographs was made in the spring of 1904 and first operated in the summer and fall of 1904 [170] in the Dunkley Company factory at South Haven; that said machine, the brush portion of which is so shown in said photographs, is the machine referred to by affiant in his said affidavit of December 6, 1918, on page 4, page 5, page 6 at line 6, and on page 6 at line 26, thereof; that said machine

was in fact the "second" machine made for use in the Dunkley factory as indicated in said Dunkley-Beekhuis Interferent Record, Patent Appeal Docket No. 790, the "first" machine being the so-called "experimental model" machine made in the fall of 1903, a photograph of which is annexed to affant's affidavit of December 6, 1918, and also appears on page 475 of said Dunkley-Beekhuis Interference Record, Patent Appeal Docket 790.

ARTHUR W. NORTON.

Subscribed and sworn to before me this 10th day of February, 1919.

[Notarial Seal]

ELIZABETH A. PARKER,  
Notary Public in and for the County of Baltimore,  
State of Maryland.

My commission will expire May 1, 1920.

Attached hereto are exhibits "A", "B" and "C".

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [171]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

## IN EQUITY—No. 211.

DUNKLEY COMPANY,

vs.

Plaintiff,

HUNT BROTHERS COMPANY, Defendant.

## IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

[172]

### Affidavit of John F. Noud.

State of Michigan,  
County of *Van Buren*,—ss.

John F. Noud, being first duly sworn, deposes and says: That he is a resident of South Haven, Michigan, and is Secretary and Treasurer of the John F. Noud Company, which has been engaged in the lumber business at South Haven for many years; that during the months of July and August, 1903, affiant sold to Dunkley Company a bill of lumber which was delivered to their factory.

That affiant has testified by deposition in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8 in the United States District Court in and for the Southern District of California, Southern Division, and in said deposition was included a copy of the account of the John F. Noud Company with Dunkley Company showing in detail the amounts and items of said lumber. Affiant refers

to said deposition given in said case, and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to give like testimony by deposition in the above entitled causes, or in any other proceeding involving the same issues.

(Signed) JOHN F. NOUD.

Subscribed and sworn to before me this 14th day of December, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [173]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.



IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corpora-  
tion,                                      Defendant.

**Affidavit of Nicholas Plating.**

State of Michigan,  
County of Kalamazoo,—ss.

Nicholas Plating, being first duly sworn, deposes and [174] says: That he is 53 years of age; was born in Kalamazoo, Michigan, and has resided in said city practically all of his life; that he has been in the boiler business in Kalamazoo for 33 years, being employed practically all of that time by Clark Engine & Boiler Company; that he has read the letter of Clark Engine & Boiler Company addressed to Dunkley Company under date of April 21, 1903, as reported in the transcript of record of the above-entitled causes, and that the same does not refer to any tank made for a lye peeling machine, but does refer to a soup tank which was manufactured by Clark Engine & Boiler Company for Dunkley Company in the spring of 1903; that said tank was a round, upright tank about 30 inches in diameter and four feet high; that said tank had a flanged top with

41 studs in said flange and with rubber gaskets thereon, and with removable lid, said lid being fastened down with said stud bolts.

That affiant recalls the making of said tank and knows that it was used by Dunkley Company in its factory at Kalamazoo later on that year for the cooking of soup for canning purposes; that soon after the delivery of said tank it was reported to affiant that the tank leaked, and affiant thereupon went to said factory to examine the tank and upon that occasion he was given some soup out of the tank to drink; that said tank was a galvanized tank and the lid thereof had two handles attached for the purpose of removing and replacing said lid; that a photographic copy of the invoice of Clark Engine & Boiler Works under date of April 20, 1903, covering said soup tank, is attached hereto and marked Exhibit "A" and made a part hereof.

That the first lye tank which was made by Clark Engine & Boiler Company for Dunkley Company was made in January, 1904, and was similar in design to photograph 7 shown in patent drawings accompanying letters patent No. 1,104,175.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8 [175] in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit, and the testimony given in said case, in any or all of

the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) N. PLATING.

Subscribed and sworn to before me this eighth day of February, A. D. 1918.

[Notarial Seal]

(Signed) URAL S. ACKER,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

Attached hereto is exhibit "A".

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.



IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Supplemental Affidavit of Nicholas Plating.**

State of Michigan,  
County of Kalamazoo,—ss.

Nicholas Plating, being first duly sworn, deposes and says:

That he is now and for practically all of his life has been a resident of Kalamazoo, Michigan. He is a boilermaker, and for nearly thirty-three years has worked for the Clark Engine & Boiler Co. While with that company he worked on two tanks for the Dunkley Company. One was a boat-shaped tank. Exhibit "A" attached hereto is a true photograph of a crude sketch made by him of this tank. Exhibit "B" hereto attached is a true photograph of a sketch made by him of the other tank referred to. This was a soup [177] tank. He is of the opinion that the letter-press copy of the invoice of the Clark Engine & Boiler Co. of April 20, 1903, of which Exhibit "C" is a true photograph, covers this soup tank. The soup tank was a round kettle with a head in the bottom, flanged over the top about two inches, with stud bolts in the

flange about two inches apart and with rubber gasket on top of the flange. The lid or cover of the tank was made steam tight by the stud bolts. The tank was about thirty inches in diameter and about four feet high. The items specified in said invoice of April 20, 1903, correspond with the material used in the said soup tank. Affiant does not remember any other tanks to have been made by Clark Engine & Boiler Co. for Dunkley Company during the years 1902 to 1905, inclusive.

Affiant was a witness in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., in the United States District Court for the Southern District of California, Southern Division, Equity C-8, and testified therein, and affiant hereby refers to the transcript of his testimony of record in that cause and hereby makes said transcript a part of this affidavit as if fully set forth herein; that affiant will testify in the above titled causes or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 as to the facts set forth in this affidavit.

(Signed) N. PLATING.

Subscribed and sworn to before me this 8th day of February, 1919.

[Seal] (Signed) URAL S. ACKER,  
Notary Public in and for the County of Kalamazoo,  
State of Michigan.

Photographic Exhibits "A" and "B", attached. Exhibit "C" the same as Exhibit "A" attached to N. Plating's affidavit of Feb. 8, 1918. [178]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL, and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [179]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Louis Payne.**

State of Michigan,  
County of Kalamazoo,—ss.

Louis Payne, being first duly sworn, deposes [180]

and says that he is and for many years last past has been a resident of the City of Kalamazoo, Michigan; that during the spring of 1904 affiant made for Dunkley Company, upon the order of Stewart Campbell, certain patterns for parts of a peach peeling machine, which Campbell informed him was a new device which had never been used commercially in the peeling of peaches before that time.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) LOUIS PAYNE.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

FLOYD R. OLMSTED,  
Notary Public in and for County of Kalamazoo, State  
of Michigan.

Notary Public, Kalamazoo County.

My commission expires Sept. 13, 1922.

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.



[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [181]

In the District Court of the United States for the  
Northern District of California.

DUNKLEY COMPANY,  
against

Plaintiffs,

CENTRAL CALIFORNIA CANNERIES  
et al., Defendants.

### Affidavit of Daniel P. Robinson.

Daniel P. Robinson, being duly sworn, deposes and says that he is a resident of the City of Baltimore, State of Maryland; that he is factory manager of the Continental Can Company; that during the year 1904, and prior thereto, he was connected with the Experimental Department of the American Can Company, and that in such capacity, he had occasion to visit the South Haven plant of the Dunkley factory, in Michigan, at frequent intervals.

That in the late spring or early summer of 1904, affiant saw at the Dunkley factory at South Haven, a brush peach peeling machine, which at that time was not yet ready for operation; that this machine had three carrier belts, and three sets of longitudinal roller brushes, and was called a three-line machine; that shortly thereafter, in June, 1904, affiant went to the Hawaiian Islands and remained away for ten weeks, and that he returned during the autumn of 1904, and during October, 1904, saw the last above

mentioned peach peeling machine in operation at the Dunkley factory; and,

That it was commonly known at said factory that this machine was then in commercial use for the first time, that is to say, it was first used during the peach season of 1904, and affiant states that the peach season was unusually late that year, and [182] that snow had fallen before the season ended.

That said machine so operated for the first time in said factory was known as the "Prevaricator", and was a 3-line machine, which had a big tank set up high and a chain flight that carried the peaches up through a lye bath, and then to a conveyor that carried them on through the further processes.

That this machine was commonly known and referred to by the Dunkley employees at that time as the "Prevaricator", and that it was commonly known that this was the first complete prevaricator, to wit, rotary three-brush peeling machine with lye tank attached, that was ever set up or operated at the Dunkley factory at South Haven; and that affiant saw this complete machine in operation at the Dunkley factory at South Haven, in the autumn of 1904.

That before this "Prevaricator" was installed, the long hand-peeling table which had previously been in use, was cut about in half during the previous winter, either late in 1903 or early in 1904, and that half of this table was installed on one side of the room and the other half left on the other side of the room; that affiant is unable to recall the points of the compass with reference to said room, but that said long

hand-peeling table before it was cut in half was on the side of the room paralleling the railroad tracks which ran along the side of the building, and that the "Prevaricator" or three-line rotary brush machine with lye tank attached was installed on the side of the room paralleling the railroad tracks, near the remaining half of the hand-peeling table, with two machines known as the "Campbell Pitters", between the end of the hand-peeling table and the delivery end of the rotary brush machine, so as to make a direct line of operation for the peaches from the lye tank into the rotary brush machine, and thence to the "Campbell Pitters" and thus to the hand-peeling table, which was transformed into an inspection and trimming table, and then to the filling table, and thence to the syrupe; and [183]

That five or six pitting machines of a different type called the Kalamazoo Pitters, were installed on the one side of the room so as to make another direct line of operation consisting of these Kalamazoo Pitters from which the peaches went to the other half of the hand-peeling table, which had also been transformed into an inspection and filling table.

That said three-line commercial brush machine had a wooden frame.

That the following year, to wit, in 1905, the Dunkley Company caused a new type of brush machine to be constructed with an iron frame, and only two carrier belts with only two sets of rotary brushes, and that one of these iron frame machines was sold or shipped to the California Fruit Cannery Association, to its plant at Chico, California, and affiant saw

said iron frame machine at said Chico plant during said year of 1905.

That affiant has examined Patent Appeal Docket No. 790 of the Court of Appeals, District of Columbia, being the record in an appeal from the Commissioner of Patents in Interference No. 30,610, entitled Samuel J. Dunkley, Appellant, vs. Hermanus A. Beekhuis, and affiant has particularly examined photographs appearing on pages 476, 477 and 478, and which are designated thereon respectively as "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine," "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine," and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine"; on said pages of said record; that said photographs are true and correct photographs of the brush portion of S. J. Dunkley's peach peeling machine, to wit, the machine which affiant saw set up in the late spring or early summer of 1904, but not ready for operation, as hereinabove set forth; and which said machine affiant saw in operation later in the autumn of 1904 toward the end of the peach peeling season [184] of that year;

That affiant is ready and willing to testify to the truth of the foregoing facts as they have been herein stated by him whenever called upon so to do in the above-entitled case; or otherwise.

DANIEL P. ROBINSON.

State of Maryland,  
City of Baltimore.

Subscribed and sworn to before me this 13th day of  
February, A. D. 1919.

[Notarial Seal]      NETTIE R. COHEN,  
Notary Public in and for the City of Baltimore, State  
of Maryland.

My commission expires May 1, 1920.

Attached hereto are exhibits "A", "B," and "C".

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [185]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.



IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of William C. Spencer.**

State of Michigan,

County of Van Buren,—ss.

William C. Spencer, being first duly sworn, [186] deposes and says that he is now and for many years last past has been a resident of the City of South Haven, State of Michigan; that he is employed by the South Haven Chemical Company as a salesman and bookkeeper.

That during the peach season of 1904, affiant was employed by Dunkley Company to buy peaches; that during the time of said employment affiant saw Dunkley Company's first commercial peach peeling machine in operation in its factory at South Haven; that S. J. Dunkley informed affiant at said time that said machine and lye process employed was something new, which had just been put in that year; that in the year 1909 and after said Dunkley Company had gone into bankruptcy, affiant was employed by S. J. Dunkley to go through the factory building each day for purposes required by insurance policies, and that while so doing affiant examined the office in said factory and its contents and there were no books of account, records or other books there; that said Dunkley Company went into bankruptcy in the year 1908, and thereafter the factory of Dunkley

Company was never operated, and that the same was destroyed by fire in the year 1912.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or simi- [187] lar issues are involved.

(Signed) WILLIAM C. SPENCER.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for County of Van Buren, State  
of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [188]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of Mrs. Mary J. Stafford.**

State of Michigan,

County of Van Buren,—ss.

Mrs. Mary J. Stafford, being first duly [189] sworn, deposes and says that she has resided in the City of South Haven since 1903; that she worked at the Dunkley South Haven factory in the peach season of 1903, and at no other time; that she fixes the date by the time at which she moved to South Haven from the country, which was in April, 1903,



and from her picture in a photograph of the interior of the Dunkley factory taken during the peach season of that year.

That affiant was employed, peeling peaches by hand during the peach season of 1903 and worked at the long peach peeling table, a photograph of which is contained in the record of the Pasadena Canning Company case as defendant's Exhibit 3 and 3a, said photograph showing affiant seated at said table.

That all of the peaches peeled during the season of 1903 were peeled by hand or by little hand machines; that she pitted no lye peeled peaches and saw none pitted by anyone else during said season of 1903; that no peaches were peeled by the lye process commercially during that season, and there was no lye peach peeling machine in operation on the main floor of the building, or elsewhere, to her knowledge; that had peaches been peeled in any quantity commercially during the peach season of 1903, affiant would have known of it.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part [190] hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. MARY J. STAFFORD.

Subscribed and sworn to before me this 30th day  
of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for County of Van Buren, State  
of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [191]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.                      Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,

vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Fred Stebler.**

State of California,

County of Riverside,—ss.

Fred Stebler, being first duly sworn, deposes and says:

That he resides at Riverside, in the State of California, and is engaged in the business of manufacturing fruit machinery, having been engaged in that business for the past 19 years.

That in the year 1902 he visited the cannery of the California Fruit Canners' Association, at Fresno, California. That on said visit to said cannery in the year 1902, affiant saw in use an apparatus or machine for the purpose of peeling peaches; that said machine is what is known as the Baker-Chalker Orange Washer; [192] that said machine was equipped with cylinder brushes rotating in a frame about 6 feet long, with a traveling belt or conveyor between the brushes. Over the brushes were arranged perforated water pipes from which jets or sprays of water under pressure descended upon the brushes. That peaches were carried on the traveling belt or conveyor between the brushes, and by means of the brushes and sprays of water from the pipes arranged above, the peeling was removed from the peaches. That affiant recalls that the principal means of re-

moving the peeling from said peaches was the jets or sprays of water from the perforated pipes. That affiant has often observed Baker-Chalker machines in use for washing oranges at numerous canneries in the State of California, and affiant observed that in said machine so used at Fresno more water was used than is ordinarily used when washing oranges with said machine.

That affiant purchased the patent under which the Baker-Chalker Orange Washer is manufactured some time in 1905 or 1906, and is familiar with said patent. Attached hereto and marked Exhibit "A" is a photograph of one of said machines.

That affiant fixes the date of his said visit to Fresno as the year 1902 by means of certain correspondence dated in 1902.

That affiant is not interest or involved in any of the litigation affecting the Dunkley patent in suit in the above-entitled causes.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. before the United States District Court of the Southern District of California, Southern Division, and refers to the official transcript of his evidence in said cause, and makes the same a part hereof as though fully set forth at length. That affiant is ready and willing to testify to the foregoing facts and in accordance with his testimony in said causes in the above-entitled causes or any of them. [193]

(Signed) FRED STEBLER.



Subscribed and sworn to before me this 15 day of February, 1919.

[Seal] (Signed) L. P. SINNIS,  
Notary Public in and for the County of Riverside,  
State of California.

(Photographic Exhibit "A" attached hereto.)

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [194]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,      Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,

vs.

SUNLIT FRUIT COMPANY,              Defendant.

**Affidavit of Harrie E. Stewart.**

State of California,  
County of Alameda,—ss.

Harrie E. Stewart, being first duly sworn, deposes and [195] says:

That he is now and for a number of years last past has been a resident of the County of Los Angeles, State of California, and is employed by the Malcolm McLaren Investigating Bureau, of Los Angeles, California.

That affiant was engaged by the defendants in the above-entitled causes to attend the trial of the case of Dunkley Company vs. California Packing Corporation in the United States District Court in and for the Southern District of New York, in October, 1918, and to make investigation for the purpose of ascertaining any new evidence adduced in that case which might be pertinent to the issues herein; that during said trial there were installed in the factory of the American Can Company on Long Island certain machine exhibits for the purpose of demonstrating to the Court their mode of operation; that among said machine exhibits was a Baker-Chalker-Ferguson Washer, a photograph of which is hereto attached marked Exhibit "A", and hereby made a part hereof; that on October 28th, 1918, the day previous to the

demonstration made in the course of said trial, a number of tests of said machine were made at said factory in the presence of affiant, E. S. Frey, W. R. McRae, Kemper B. Campbell, and others; that above the conveyor belt between the two cylindrical brushes was a perforated water pipe for the delivery of water upon fruit; that several lots of fruit were put through the machine at that time, in some instances the water being turned on and being directed upon the fruit from said perforated pipe, and in other instances the water being turned off, the brushes, however, being saturated with water from previous operations; that in the tests wherein the water was directed upon the fruit from the perforated pipe as aforesaid the peaches came out of the machine perfectly peeled; that in the tests wherein the water was turned off from said perforated pipe as aforesaid the disintegrated peeling was only in part removed [196] from the peaches and the peaches were discharged from the machine with a considerable portion of the disintegrated peeling remaining thereon and in a condition entirely unfit for canning.

HARRIE E. STEWART.

Subscribed and sworn to before me this 23d day of February, 1919.

[Seal]

G. L. RANKIN,

Notary Public in and for the County of Alameda,  
State of California.

Attached hereto is Exhibit "A".

[Endorsed]: Filed Feb. 24, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [197]

In the Southern District of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of William Triece.**

[198]

State of Michigan,  
County of Van Buren,—ss.

William Triece, being first duly sworn, deposes and says: That he is now and for 38 years last past has been a resident of the City of South Haven, State of Michigan; that his vocation is that of sailor and that he is licensed as a first-class pilot; that his first employment with Dunkley Company was that of install-

ing electric lights over the long hand-peeling table about August 20, 1903, said date being fixed by entries in affiant's account-book made at the time; that affiant was employed during the peach season of 1903 repairing Sinclair-Scott hand-peeling machines; that affiant saw the experimental model peach-peeling machine, the original of which was introduced in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8 in the United States District Court of the Southern District of California, Southern Division, as "Defendant's Exhibit 11", in the basement of the Dunkley factory during the season of 1903, and late in October of the same year he saw Stewart Campbell operating the same by hand in the presence of Mr. C. D. Crary; that there were no peaches peeled by lye commercially at the Dunkley factory during the season of 1903; that all of the peaches canned during that season were peeled by hand and with hand machines by women who sat at said long hand peach peeling table; that said long hand peach peeling table was about 150 ft. in length and was built and installed early in the month of August, 1903; that after the season of 1903 affiant worked for Dunkley Company at South Haven from the month of April, 1904, until the spring of 1905.

That he helped to install the first commercial lye peeling machine consisting of lye tank and brush machine, and [199] also helped install the Campbell pitters. That the long hand peeling table was prior to the peach season of 1904 cut into two parts, one being placed on the north side and one on the south side of the main factory-room; that during the

season of 1904 affiant had charge of and operated said first commercial lye peach-peeling machine; that said first commercial lye peach-peeling machine consisted of a brush machine having three conveyors and three sets of cylindrical rotating brushes, and a tank about 40 inches wide and 12 feet long, and from 16 to 18 inches deep, made of quarter-inch iron, said tank having a circular offset across the bottom of said tank near one end thereof; that no other lye peeling machine was used in said Dunkley factory during the 1904 season, nor did affiant see any other machine at said factory up to the time he ceased his employment in the spring of 1905; that there was no other lye tank at said factory in 1904 than the one above described, which was constructed early the same year; that affiant has seen the photographs as represented on pages 1123, 1124 and 1125 of "Plaintiff's Exhibit A" in said case of Dunkley Company et al. vs. Pasadena Canning Company et al., entitled "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine" and "Dunkley's Exhibit No. 2, Photograph 3 of Second Machine", respectively, copies of which said photographs are hereto annexed and marked respectively Exhibits "A", "B" and "C" hereof.

And affiant has also seen pages 476, 477 and 478 of a copy of Patent Appeal Docket 790 (Interference No. 30,610), said pages containing photographs entitled respectively "Dunkley's Exhibit No. 2, Photograph 1 of Second Machine", "Dunkley's Exhibit No. 2, Photograph 2 of Second Machine" and "Dunkley's Exhibit No. 2, Photograph 3 of Second Ma-

chine"; that all of said photographs are photographs of said first commer- [200] cial machine which affiant assisted Stewart Campbell to install, and which this affiant, during the season of 1904, was in charge of and personally operated; that at the time affiant assisted in said instalment and at the time that he took charge of the operation of said machine said machine and every part thereof was new and had never been used before.

That affiant was a witness in said case of Dunkley Company et al. vs. Pasadena Canning Company et al., and testified therein; and affiant hereby refers to the transcript of his testimony of record in that case, and hereby makes said transcript a part of this affidavit as if fully set forth herein; that affiant will testify in the above-entitled causes, or any of them, or in any other suit or proceeding involving the validity of letters patent 1,104,175 to the facts as set forth in this affidavit.

(Signed) WILLIAM TRIECE.

Subscribed and sworn to before me this 30th day of November, A. D. 1918.

[Notarial Seal]

(Signed) ROY S. McCRIMMON,  
Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Attached hereto are exhibits "A", "B" and "C".

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [201]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
Company, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.



IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,              Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, a Corporation,  
Defendant.

[202]

**Affidavit of Abe Vanderbrook.**

State of Ohio,  
County of Wood,—ss.

Abe Vanderbrook, being first duly sworn, deposes and says: That he lives at Perrysburg, Ohio, and is employed by the American National Company in the paint business; that he was employed off and on by the Dunkley Company from the year 1895 to the

spring of 1905; that the peach season of 1904 was the last full season during which affiant was employed by said Dunkley Company in its factory at South Haven; that during the 1903 and 1904 peach seasons affiant's duties were to receive, weigh and grade the fruit.

That affiant knows Nate Simpson, who testified in the Pasadena Canning Company case in behalf of plaintiff that he (Simpson) had charge of the receiving of fruit during the season of 1903; that said testimony of said Simpson is untrue, the fact being that affiant had entire charge of the receiving of fruit during that season, and said Simpson had nothing whatever to do with it; that the place where the fruit was received was on the porch immediately adjoining the main operating room of the factory and about 25 or 30 feet from the long hand peach peeling table, which was installed immediately prior to the opening of the 1903 peach season; that in pursuance of his duties he had frequent occasion to go inside of the factory where the peaches were being peeled and otherwise prepared for canning; that there was no commercial lye peeling machine operated in said factory during the peach season of 1903; that all of the peaches canned during that season were peeled by women by hand, or by the small Sinclair-Scott hand peeling machines; that during the peach season of 1904 a lye peeling machine, and one only, was first used commercially in the South Haven factory of Dunkley Company. [203]

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al.

Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit, in any or all of the above entitled causes and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) ABE VANDER BROOK.

Subscribed and sworn to before me this 29th day of November, A. D. 1918.

[Notarial Seal]

(Signed) FREEMAN E. BOWERS,  
Notary Public in and for said County of Wood, State of Ohio.

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [204]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY, ..

Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of S. Van Ostrand.**

State of Michigan,

County of Van Buren,—ss.

S. Van Ostrand, being first duly sworn, under oath deposes and says: That for many years he was engaged in business as a druggist in the City of South Haven, Michigan, and was also secretary and treasurer of the Gas Manufacturing System which supplies South Haven with gas for light and fuel; that he was also owner of a peach orchard in the vicinity



of South Haven, and as such was deeply interested in the development of the peach growing and canning industry; that affiant has known S. J. Dunkley for about 20 years, during all of which time he has been upon terms of intimacy with him; [205] that during the year 1903 affiant informed said Dunkley that a man by the name of F. I. Parks, living near South Haven, had peeled peaches by lye as early as 1869 or 1870 and thereafter; and affiant described to said Dunkley the method employed by said Parks in disintegrating the skins of the peaches by submerging them in hot lye and the removal of the disintegrated skins by rinsing the peaches in cold water; that affiant during the year 1903 had a number of conversations with S. J. Dunkley concerning the peeling of peaches with lye; that during the year 1903 Dunkley inquired of affiant whether affiant had any catalog of cylindrical brushes, said Dunkley informing affiant that he (Dunkley) wanted to get some cylindrical brushes to be used in the building of a machine to peel peaches; that during the month of October, 1903, said Dunkley purchased from affiant two small quantities of lye, to wit: on October 4, 1903, one-half pound of by-carbonate of potash, price 25 cents, and on October 24, 4½ pounds of crude potash, price 50 cents; that affiant's books of account contain entries which show these purchases and said books were produced and exhibited by affiant in court in the trial of the case of Dunkley Company et al. vs. Pasadena Canning Company et al. (Equity C-8, Southern District of California) and said entries were read into the record of said action; that affiant has also his books

of account for 1902, the same containing accounts with said Dunkley Company covering transactions during the year 1902; that said 1902 accounts do not show any purchases of lye; affiant offers to produce his said books of account herein; that affiant was so interested in the idea of peeling peaches with a machine that he went to the Dunkley factory on the 20th day of October, 1903, and saw the first experimental machine in the basement set up, without a lye tank, and that upon that occasion affiant visited the peeling department of the factory to see whether the lye process of the lye peach peeling machinery was in commercial operation, [206] and that affiant found that no lye peeling machine was installed or at all in the main floor or in operation at that time, but on the contrary all peaches were being peeled by hand; that affiant fixes the date of his said visit to the Dunkley factory by an entry in affiant's memorandum-book referring to a transaction occurring upon the same day as affiant's visit to said factory.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set for herein; that affiant is willing to testify in accordance with this affidavit, in any or all of the above-entitled causes and in any other suit or proceeding in which the same or similar issues are involved.

That by reason of an injury to affiant's right arm, he

is unable to sign his name to this affidavit, but affixes his signature thereto by his mark duly witnessed.

(Signed) S. ( His ) VAN OSTRAND.

( x )

(mark)

Witnesses as to mark:

WILLIAM C. SPENCER.

MRS. C. S. HALL.

Subscribed and sworn to before me this 5 day of Feb., 1919.

[Notarial Seal]

RAY S. McCRIMMON,

Notary Public in and for the County of Van Buren,  
State of Michigan.

My commission expires Sept. 22, 1919.

Received copy of the within affidavit this 17th day  
of February, 1919.

FRED L. CHAPPELL and

W. A. RICHARDSON,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [207]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFEN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff,

vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff,

vs.

J. F. PYLE & SON, INC., Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff,

vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff,

vs.

SUNLIT FRUIT COMPANY, Defendant.

**Affidavit of Mrs. Frank Webb.**

State of Michigan.

County of *Saginaw*,—ss.

Mrs. Frank Webb, being first duly sworn, [208]  
deposes and says that she is a resident of South Haven  
and has lived there since the year 1899; that she was  
employed at the Dunkley factory at South Haven  
during the peach season of 1903 only; that she fixes  
this date by reference to the pay roll of William  
McEwing, and also by a photograph of the long



peeling table, in which affiant and Mrs. Weed are shown seated together, said photograph having been taken in the year 1903.

That affiant was employed peeling peaches by hand at the long hand peeling table at the Dunkley factory during the season of 1903; that she pitted no lye peeled peaches and saw none pitted by anyone else during said season of 1903; that affiant is positive that there was no lye peach peeling machine in commercial operation in the Dunkley factory during the peach season of 1903; that during the peach season of 1903 all peaches were peeled by hand and by hand machines, and there were no peaches peeled by the lye process or by a peach peeling machine;

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al. Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above-entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. FRANK WEBB.

Subscribed and sworn to before me this 2d day of December, A. D. 1918.

[Notarial Seal]

(Signed) J. O. NEWBERRY,  
Notary Public in and for County of *Saginaw*, State  
of Michigan.

Com. expires Dec. 27, 1919. [209]

Received copy of the within affidavit this 17th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [210]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

IN EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff,

vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant.

IN EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

IN EQUITY—No. 206.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,  
Defendant.

IN EQUITY—No. 209.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

IN EQUITY—No. 210.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

J. F. PYLE & SON, INC.,                  Defendant.

IN EQUITY—No. 211.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

IN EQUITY—No. 212.

DUNKLEY COMPANY,                      Plaintiff,  
vs.

SUNLIT FRUIT COMPANY,      Defendant.

**Affidavit of Mrs. Nellie Weed.**

State of Michigan,  
County of *Van Buren*,—ss.

Mrs. Nellie Wood, being first duly sworn [211]

deposes and says that she has lived at South Haven for about twenty years, and that she was employed at the Dunkley factory during the peach season of 1903 only; that she fixes said date from the pay rolls of William McEwing, at whose factory she worked one half day during that season, and by other circumstances including a photograph of herself which appears in a picture of a portion of the interior of the Dunkley factory, taken in the peach season of 1903.

That affiant was employed peeling peaches by hand at the long hand peeling table at the Dunkley factory during the season of 1903; that she pitted no lye peeled peaches and saw none pitted by anyone else during said season of 1903; that affiant is positive that there was no lye peach peeling machine in commercial operation in the Dunkley factory during the peach season of 1903.

That affiant gave testimony in the case of Dunkley Company et al. vs. Pasadena Canning Company et al., Equity C-8, in the United States District Court, Southern District of California, Southern Division, and affiant refers to the official transcript of said testimony and hereby makes the same a part hereof as if fully set forth herein; that affiant is willing to testify in accordance with this affidavit and the testimony given in said case, in any or all of the above entitled causes, and in any other suit or proceeding in which the same or similar issues are involved.

(Signed) MRS. NELLIE WEED.





**Affidavit of William K. White.**

State of California,

City and County of San Francisco,—ss.

William K. White, being first duly sworn, deposes and says:

I was one of the solicitors for the above named defendants in the above-entitled suit and as such had charge of the preparation of said causes for trial on behalf of the defendants. The defense of said causes was carefully and diligently prepared and diligent investigation made to ascertain the state of the prior art. I caused a search to be made in the United States Patent Office by C. A. Mason, of Washington, D. C., to ascertain what prior patents had been issued with reference to the subject matter of the patent in suit and analogous [214] subjects. Said search and other searches, made by other parties at my request were diligently and thoroughly made and included a search of prior publications and foreign patents. I made numerous inquiries and investigations throughout the United States and caused numerous inquiries and investigations to be made by the officers and employees of the defendants herein.

Despite the exercise of the utmost diligence, at the time of the trial of the above-entitled causes before this Honorable Court, I did not know that a machine had ever been used by McDermett nor did counsel associated with me in the defense of said suits or the officers of the defendant corporations have knowledge of such a machine. Prior to the filing of the answers therein, my attention was directed to United States

Letters Patent No. 511,709 issued on December 26, 1893, to Ida L. McDermett, of Baird, Texas, for a process for "Preparing Fruit For Canning and Preserving," although this patent discloses a *process* and contains no intimation that any *machine* had been used by the patentee in practicing such process. I thought it barely possible that such a machine had been built and used by the patentee, and therefore, out of abundance of caution and with a desire to exercise the utmost diligence in ascertaining the state of the prior art, I mailed a letter to the patentee, Ida L. McDermett, at the address given in the patent, to wit: Baird, County of Callahan, State of Texas, and in this letter, which was mailed on or about August 25, 1915, I inquired whether or not any apparatus had been constructed for the purpose of carrying out the process described in the patent; a carbon copy of said letter is annexed hereto and made a part hereof; the original letter, with the envelope containing the same, unopened, was returned to me by the United States postal authorities; on the envelope was stamped an official notice to the effect that the party to whom the letter was addressed, could not be located; as I am unable to locate such original letter, I [215] presume that the same was destroyed by me at the time of the receipt thereof; as I had no knowledge or intimation that any such machine, had been, *in fact*, constructed or used by the patentee McDermett, in practicing said process, I was of the opinion that I was not justified in putting my clients to the expense of making any investigation in Texas for the purpose of locating the patentee or ascertaining if,

*in fact*, such a machine had been used; I have since been informed the said patentee died prior to the mailing of my said letter.

I did not know of the publication of Archdeacon's Kitchen Cabinet at the time of the trial of said causes nor did counsel associated with me, or the officers of the defendant corporations know of said publication nor did I know of the existence of the same until the trial of the case of Dunkley Company vs. Pasadena Canning Company, in the year 1918.

Prior to the trial of said suits, I studied and was thoroughly familiar with the testimony given on behalf of the patentee Dunkley in the interference declared by the Patent Office between the then pending application of Dunkley and Patent Number 864,944 issued on September 3, 1907, to H. A. Beekhuis, upon the latter's application filed on May 25, 1904;

In my study of the record in said interference proceeding, I observed that:

a. In 1910, the patentee, Dunkley, testified his first machine, embodying *the only invention* involved in said interference, to wit: means for removing the *previously* disintegrated skin from the fruit, and consisting of means for supporting and advancing the fruit and means for directing peeling jets of water upon the fruit, was built in July 1903, and that said first machine, was a *model, one line machine*. (The questions and answers showing such testimony are herewith annexed and marked Exhibit "B" and by this reference made a part of this affidavit.)

b. In 1910, the patentee's son, Melville Dunkley, testified [216] that said first machine was built in the summer of 1903.

(The questions and answers showing such testimony are herewith annexed and marked Exhibit "C" and by this reference, made a part of this affidavit).

c. In 1910, Dunkley's witness, Verhage, testified that the *wooden frame* of said first machine was made in July 1903, and the machine *first set up* by himself and *Stewart Campbell* in the basement of the north wing of the Dunkley cannery in South Haven. (The questions and answers showing such testimony are hereto annexed and marked Exhibit "D", and by this reference made a part of this affidavit.)

d. That no witness, in said interference, even remotely intimated that said first machine, a model machine, was made prior to July 1903 and that neither of the Dunkleys, although called on *to give the full history* of the Dunkley invention, even remotely suggested, intimated or hinted that *any part* of said model machine was made prior to July, 1903.

e. That in his verified preliminary statements filed by him in said interference, the patentee Dunkley swore he conceived his invention in August 1902; in September, 1902, made a drawing disclosing the same and that the invention was first embodied in a complete working structure during July, 1903. (An excerpt is hereto annexed marked Exhibit "E" and by this reference made a part of this affidavit showing said statement of said Dunkley.)

Also, prior to the trial of said suits, I interviewed Stewart Campbell, William Brunner and Mapes, witnesses thereafter called on behalf of the defendants herein; their statements to me *corroborated* the 1910 interference testimony given on behalf of Dunkley



and to the effect that Dunkley's first *model, one-line* machine was built in 1903, at a time when Brunker worked for the Dunkley Company in South Haven, *he never having* [217] *worked for the Dunkley Company at any other time other than during the period commencing in June 1903 and ending about November 1903*; the statements of Campbell, Brunker and Mapes, and Mapes's account book, showed, however, that said model machine was not completed until some time in October 1903;

The statements of Campbell and my own personal investigations, made for the purpose of checking up such statements, disclosed to me the names of the various firms from whom the material for Dunkley's first two machines, the model, *one-line* machine, and the *three-line* machine, was bought:

Also, prior to the trial of the said suits, I was familiar with the proofs which could be produced and showing that G. E. Grier of Pasadena, had conceived his anticipating invention at a date as early as the conception date claimed by Dunkley in said interference; and that two anticipating full-sized commercial machines had been commenced by Grier in April 1903, completed in July, 1903 and one of them put into public use during that month and the other put into public use as early as August 3, 1903.

The application for the Dunkley patent in suit having been filed on November 29, 1904, and I, being familiar with the rule of law requiring the patentee Dunkley to anticipate any anticipation of his patent by clear, unequivocal and convincing proofs, felt absolutely certain that Dunkley could not anticipate



Grier's dates and be adjudged the prior inventor, even though he was able to establish the dates relied on by him in said interference proceeding and prove that his first model machine was built in *July 1903, as testified to in such interference.*

Hearing from Campbell that he built Dunkley's first two machines, the *one-line model*, and the *three-line commercial machine* and also learning from Campbell the names of the various concerns from whom Dunkley Company bought the material and parts for said two machines, I felt certain the [218] Dunkleys, in their efforts to anticipate Grier's dates and contradict Campbell, would not dare testify any one, other than Campbell, built said machines, because such testimony could be too easily checked up and contradicted by the party named by them and, further that they would not dare to name the concerns from whom the material and parts of said machines were bought, because such testimony could likewise be too easily checked up.

By reason of the foregoing situation, I assumed that *merely the oral testimony* of three witnesses, each of them highly interested, given on the behalf of the Dunkley Company, and uncorroborated by documentary proofs and directly contradicted by three disinterested witnesses and the account book of one of them, could not be held sufficient, under the authorities, to sustain the burden of proof placed on plaintiff and requiring it to establish, by clear and convincing proofs, the date of Dunkley's invention as prior to Grier's dates.

Furthermore, I did not anticipate that the Dunkleys

would change their 1910 testimony and swear that the model machine was made in 1902 instead of *in July 1903*, as testified to by them and their witnesses in the interference.

I could not in the very nature of things, anticipate any such change in their 1910 testimony, and especially could I not do so, in view of the fact that, as late as 1915, in the suit of Dunkley Company vs. California Canneries Company, then pending in this court, the patentee Dunkley would not and did not testify he had built or used any such model machine in 1902. I heard him give his said testimony in 1915 and heard him questioned on this very point by this Honorable Court. (The testimony of said Dunkley is hereto annexed and marked Exhibit "F" and by this reference made a part of this affidavit.)

In view of the foregoing situation, I believed it safe for defendants to rely on the testimony of Campbell, Brunker and [219] Mapes, the 1910 contradictory testimony of the two Dunkleys and plaintiff's refusal to produce any documentary evidence, which, on its face, would prove anything material or relevant, and, therefore, did not think it necessary for defendants to ask for a continuance in order to produce additional witnesses when, *much to the surprise of defendants and their solicitors*, the two Dunkleys gave testimony herein so inconsistent with their 1910 and 1915 testimony and which 1910 and 1915 testimony, in my opinion, was insufficient to sustain plaintiff's contention that Dunkley and not Grier was the prior inventor.

That at the time of the trial of the above entitled causes I had no knowledge of newspaper articles pub-

lished in the Daily Tribune of South Haven, Michigan, on October 1, 1903, and in The Tribune Messenger, of South Haven, Michigan, on April 22, 1904, relating to the Dunkley factory of South Haven, Michigan, nor did counsel associated with me in the trial of the above-entitled causes, nor did defendants in the above-entitled causes, know of said newspaper articles.

That at the time of the trial of the above-entitled causes I had no knowledge of or information concerning the correspondence between S. J. Dunkley and the Messrs. Norton, relating to the Dunkley factory, which correspondence was produced by the Dunkley Company at the trial of Dunkley Company et al. vs. the Pasadena Canning Company et al, before the United States District Court, Southern District of California, Southern Division, nor did counsel associated with me in the trial of the above-entitled causes, nor did defendants in the above-entitled causes, know of said correspondence.

That at the time of the trial of the above-entitled causes I did not know of the use by David W. Hobson of his machine, consisting of an adaptation of the Anderson Prune Dipper, such use commencing in 1891, nor did counsel associated with me in the [220] trial of the above-entitled causes, nor did defendants in the above-entitled causes, know of said use.

That I did not present evidence of this use by J. F. Pyle and Son, a defense pleaded in the answer in the above-entitled causes, for the reason that I felt that it was unnecessary, and inadvisable, to unduly involve the case by multiplying defenses similar in their

nature. That I had investigated the defense of prior invention of the Grier machine (Defendants' Exhibit K) and had found that the invention of said machine by Grier could be conclusively established as of August, 1902, and the making of two large commercial machines proved by documentary evidence as having been made in April-July, 1903, and put into commercial operation on or prior to July 30, 1903, and I relied upon the sworn testimony of the Dunkleys that their first model machine was not built until July 15, 1903, and their first commercial machine not until a considerable period of time later, and I therefore relied upon the Grier defense as being absolutely sufficient, particularly in view of other available testimony to the effect that the Dunkleys' first experimental machine was not, in fact, completed until late in October, 1903.

In the interest of justice and uniformity of decision in this circuit, I respectfully submit that these suits should be re-opened in order that defendants may produce, as witnesses herein, the large number of witnesses who testified in the suit of plaintiff vs. Pasadena Canning Company et al, and whose testimony convinced His Honor, Judge Trippet, that Dunkley's model machine was not made in 1902 but in 1903 subsequent to the construction and public use of the Grier machines; it is to be noted that the testimony of these numerous witnesses corroborates the Dunkley 1910 interference testimony to the effect that his first machine was made in 1903, whereas it conclusively [221] shows the Dunkley 1916 changed testimony herein is untrue.

WILLIAM K. WHITE.



Subscribed and sworn to before me this 18th day of February, 1919.

[Seal]                GENEVIEVE S. DONELIN,  
Notary Public in and for the City and County of San  
Francisco, State of California.

Received copy of the within affidavit this 18th day of February, 1919.

FRED L. CHAPPELL and  
W. A. RICHARDSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 18, 1919. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [222]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201—Companion Cases 202, 205,  
206, 209, 210, 211 and 212.

DUNKLEY COMPANY, a Corporation,  
Plaintiff,

vs.

CENTRAL CALIFORNIA CANNERIES COM-  
PANY, a Corporation; GRIFFIN & SKEL-  
LEY COMPANY, J. C. AINSLEY PACK-  
ING COMPANY, ANDERSON - BARN-  
GROVER MANUFACTURING COM-  
PANY, GOLDEN GATE PACKING COM-  
PANY, J. F. PYLE & SON, INCORPO-



RATED, HUNT BROTHERS COMPANY,  
and SUNLIT FRUIT COMPANY, a Corpora-  
tion,

Defendants.

CHAPPELL & EARL, of Kalamzoo, Michigan, and  
W. A. RICHARDSON, of San Francisco, Cali-  
fornia, Attorneys for Plaintiff.

KEMPER B. CAMPBELL, FRANCIS J. HE-  
NEY, FREDERICK S. LYON, and WIL-  
LIAM J. CARR, all of Los Angeles, California,  
Attorneys for Defendants.

**Motion to Reopen Decrees in Equity.**

VAN FLEET, District Judge:

The above-entitled cause and the seven similar causes by the same plaintiff, numbered in the margin, all involving the validity of the same letters patent, were heretofore tried together in this court in April, 1916, and on December 4, 1916, in accordance with an oral opinion by the Court, an interlocutory decree was entered in each holding the patent valid and infringed and ordering an accounting; these decrees were thereafter in due [223] course in all respects affirmed by the Circuit Court of Appeals (Central California Canneries Company vs. Dunkley, 247 Fed. 790) and its mandate of affirmance filed in this court on May 22, 1918; thereafter on October 14, 1918, after the coming down of the remittiturs, the present motion was interposed by the defendants asking that this court request of the Circuit Court of Appeals the withdrawal of its mandate of affirmance therein and

that the causes be thereupon remitted to this Court with authority to set aside its decrees and all other proceedings therein, to re-open the same and permit the defendants to reform and amend their pleadings and thereupon to re-hear said causes for the purpose of receiving certain alleged to be newly discovered, additional and further evidence bearing on the validity of the patent involved and its infringement by the several defendants and upon such hearing to enter new and different decrees should the evidence warrant.

The grounds of the motion are, in substance, that subsequent to the entry here of said decrees in a suit on the same patent by this plaintiff and its assignee against another alleged infringer, (*Dunkley Company et al. vs. Pasadena Canning Company*, 261 Fed. 203), tried before Judge Trippet in the District Court for the Southern District of this State wherein certain further and additional evidence was produced and heard which it is alleged could not with reasonable diligence be earlier discovered and was for that reason not available on the trial of these causes, the latter court rendered its decree on September 4, 1918, holding the patent void and dismissing the bill, which decree has thus resulted in a conflict of decision as to the validity of the patent and it is said will work confusion and result in hardship to the defendants; and it is claimed that the newly discovered evidence is of a character [224] which would render it probable that on another hearing the patent would be held void by this court. There is a further and distinct ground that at the date of the hearing in this court the plaintiff herein had parted with all its interest in the sub-

ject matter of the suit by assigning its title in the patent pending the hearing to another corporation, and for that reason it is claimed the decrees are void and should be set aside.

The motion was based upon affidavits as to diligence in discovering and the character of the newly discovered evidence largely as disclosed in the record in the cause heard in the Southern District and other evidence and documents to be produced at the hearing of the motion; and falling within the latter category there was produced and relied on at the presentation the record of the evidence, proceedings and decree in another and later suit brought by the assignee of the plaintiff, and decided by Judge Hand (A. N.) in the Southern District of New York, subsequent to the filing of this motion but before it was heard, in which the same patent was involved and wherein the decree, based substantively upon the same evidence as that produced before Judge Trippet, was again in favor of the defendant (*Dunkley Co., vs. Cal. Packing Corporation*, — Fed. —).

While as noted the motion was entered here in October, 1918, its hearing was at the suggestion of the Court postponed until the determination of the appeal then pending in the Circuit Court of Appeals, in the suit heard before Judge Trippet, in anticipation that the decision in the latter might facilitate a solution of the questions involved in the motion—and which as we shall see has contributed to that effect; that decision having been rendered (*Dunkley Co. vs. Pasadena Canning Co.*, 261 Fed. 386), the motion has after some considerable delay been argued and sub-

mitted. Since the submission an appeal in the suit in the New York case has been [225] heard and decided (*Dunkley vs. California Packing Corporation*, — Fed. — ).

Motions of similar import are not without precedent in patent cases but they are unusual, and the practice not uniform, and this fact doubtless led to some confusion in the minds of defendants' counsel as to where the jurisdiction rested. It appears that defendants first presented a motion to accomplish the same purpose and upon the same showing, to the Circuit Court of Appeals in these cases after its denial of a re-hearing but before the remittitur had been sent down; but that court peremptorily denied the defendants' motion, without opinion, and by an order which is wholly silent as to defendants having leave to apply to this court for such relief. This action is now made the basis of an objection by plaintiff that the defendants are precluded from renewing the present motion here and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked.

I was disposed at the argument to regard the objection rather lightly but a more mature consideration of the authorities discloses that the question is not free from difficulty. That defendants in applying to this Court are now pursuing the more usual and proper course in such instances is, I think, fairly to be gathered from the cases on the subject; and had that course been taken in the first instance the present objection could not have arisen. *Barber vs. Otis Motor Sales Co.*, 245 Fed. 945; *Sundh Electric Co. v. Cutler-*



Hammer Mfg. Co., 244 Fed. 163; Wilson vs. Union Tool Co., 265 Fed. 669. But this fact does not aid us. The defendants saw fit to first make the application to the Circuit Court of Appeals while the controversy was yet in its hands and it ruled upon it. That that Court had jurisdiction in a proper case to grant the relief no question is or could well be made. In *re Potts*, 166 U. S. 263; *Dunn Wire-Cut Lug Brick Co. vs. Toronto Fire Clay Co.*, 259 Fed. 258. In the latter case the Circuit Court of Appeals of the Sixth Circuit, after rendering its decree, granted a similar application authorizing the [226] lower court to re-open the cause without requiring a request from the latter. In the present case the court of appeals took cognizance of the motion and ruled on it, and apparently upon its merits—at least there is nothing to indicate a more limited view—but it denied the relief, not merely without prejudice to an application here, but unconditionally and finally, and we must therefore assume that it so ruled because the application did not appeal to it as having merit. Of course it is hardly necessary to suggest that where a question in a cause has been ruled by the higher court it becomes as to the court below the law of the case and the latter may not competently proceed in contravention of it. As stated in *In re Potts*, *supra*, where the lower court had taken a course not in pursuance of the mandate of the higher court:

“When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to



be introduced by amendment of the answer. Citing cases.) In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in *Southard v. Russell*, above cited, said: 'Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.' " [227]

But defendants contend that they are not asking here the same relief they asked of the court of appeals; that what they are asking this court to do in no way runs counter to the ruling of the higher court; that what they asked there was for a direct order from that court re-opening the decrees whereas all they ask this court to do is to *request the privilege* of taking that action. The answer of the plaintiff is that this is merely seeking the same relief by going the other way about—"Whipping the devil around the stump," as it were; and I am inclined to take that view.

But however the objection should be decided, is, in the view I take of the merits, of little moment in the present case. I say this for the reason that, after a

very careful review of the voluminous record, I find myself able to take no more favorable view of this application than that indicated by the court of appeals; and there can be no transgression or disparagement of the ruling of the latter court by looking into the record for the purpose of stating my reasons for that conclusion.

The controversy involves the validity of United States letters patent No. 1,104,175 issued to one Sam'l J. Dunkley on July 21, 1914, for a peach-peeling device for use in fruit canning, a full and luminous description of which will be found in the opinion of the Circuit Court of Appeals above noted, upholding the validity of the patent.

The conception at once took rank as of great value in the fruit canning industry, one of great magnitude in this State, and, as is not unusual in such circumstances it has almost from the date of the application been beset by bitter and stubborn litigation instigated by adverse claimants against both branches of the application;—it having been divided in the Patent Office to cover both the device patent here involved and a process patent. [228] The application was filed November 29, 1904, and before the patents thereunder were issued, there had been interposed two interference proceedings and one so-called "public use proceeding," all emanating from the same source which had to run their course through the Patent Office and the Courts of the District of Columbia, before patents were finally secured. (*Dunkley vs. Beekhus*, 39 App. D. C. 494; *Monte vs. Dunkley*, 46 App. D. C. 70; *United States, ex rel. Dunkley vs. Ewing*,

Comm. Pats., 203 O. G. 603.) And since the issuance of this device patent there has been a cloud of infringers, necessitating a large number of infringement suits, the first of which to come to trial being those in this District resulting in the decrees here involved. In view of the history of the litigation in the Patent Office it was not surprising that when those suits came on for hearing it should be found that both parties were thoroughly prepared, the knowledge gained in the interference and other proceedings having made them entirely familiar with the questions they had to meet and the evidence required; and the cases gave indication of every effort having been put forth by both parties to meet those issues with every item of evidence that could be secured, and indeed that the cases had in all respects been thoroughly prepared, through able counsel, for a determined fight. As a result the questions involved were very ably presented and no stone left unturned by either side. The whole controversy was made to turn on the same question substantially as that involved in the interference proceedings of anticipation or prior conception, there being no claim of non-infringement and the validity of the patent as involving invention being conceded. As a result of such hearings these decrees were entered; and as noted the decrees were after a full and painstaking consideration of the challenged sufficiency of the evidence fully sustained by the Circuit Court of Appeals in an elaborate opinion meeting every objection urged. [229]

It is obvious that, with this prolonged history of bitter controversy over the fundamental question of

priority which underlies these adjudications and where three several tribunals have, after the most mature consideration, successively reached the same conclusion, this court should not, without the most impelling reasons set these decrees aside and open up the whole controversy anew. As I stated to counsel at the argument I should not entertain the idea of opening up these decrees unless the showing satisfied me that the interests of justice demanded it in obedience to an unescapable conviction that a re-hearing would probably change the result. The showing has fallen far short of disclosing such a situation but, to the contrary, leaves me quite satisfied with the propriety of those decrees. I have taken pains, with the aid of a very complete index memorandum furnished by counsel, not only to carefully review the evidence introduced before me but everything additional found in the records in both *Dunkley vs. Pasadena Canning Company* and *Dunkley vs. California Packing Corporation*; presented for the first time before Judge Trippet in the former case and later to Judge Hand in the latter; and in my consideration of the evidence I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent, yet nevertheless, I am constrained to say, that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the new evidence nor with the conclusions reached in those cases. That there was a cloud of "new" witnesses it is quite true giving indication that the country had been raked with a fine-



toothed comb so to speak; but there was little new evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent. In the very recent case of *Symington Co. vs. National Malleable Castings Co. et al.*, 250 U. S. 383, 386, that Court took occasion to say: "This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; particularly if the testimony be taken after the lapse of years from the time of the alleged invention. *Deering v. Winona Harvester Works*, 155 U. S. 286, 300." There is a striking absence of anything in the nature of models, drawings or memoranda produced to support the mere oral statement of these witnesses made in nearly every instance purely from memory, and this after a lapse of from fifteen to eighteen years; and as to the items of book entry and correspondence they were not only wholly inconclusive in their character but made as strongly in support of the plaintiff's theory as to the date the invention was put in practice as that of the defendants'. Indeed I regard the item referred to as the "Norton letters", to which much significance is attached, as making, in their sequence, when properly construed, entirely in favor of the plaintiff.

And singularly enough while the motion is based



entirely on the newly discovered evidence as produced in the hearings before Judge Trippet and Judge Hand, neither of those learned gentlemen seem to have relied on it as the fundamental basis of his conclusion in determining the validity of the patent, but they both resort to evidence that had found a place in the controversy from the beginning.

For instance, Judge Trippet, after noting two or three items of book entry, in themselves of no definitive value, and referring [231] to the Norton letters, contents himself by saying: "There is other documentary evidence such as the books of the Clark Engine & Boiler Company, which throw more or less light upon the controversy." But without specifying anything further he proceeds to discuss the evidence of the witness Stewart L. Campbell, the defendants' chief witness produced before this Court on the subject as to when the first device of the Dunkley invention was constructed; and Judge Trippet shows quite clearly that it is largely upon the evidence of this witness that he bases his conclusion that plaintiff's patent had been anticipated. This witness had testified before this Court that he himself was the one who conceived the Dunkley invention and constructed the first experimental device in 1903; and that it was not built in 1902 as testified by Dunkley. Of this testimony I had occasion to say in my opinion: "The main reliance by defendant in the evidence is upon the testimony of the witness Campbell \* \* \*. I indicated at the trial, and my mind has been only confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put

credence in the testimony of Campbell." When the cases got to the Circuit Court of Appeals the appellants disclaimed relying on Campbell's testimony that he was the inventor of the peach-peeling device but offered it only to negative Dunkley being the inventor. This attitude occasioned the Circuit Court of Appeals to say in its opinion:

"There is in the record the testimony of one Stewart L. Campbell, who was called as a witness by the defendants in surrebuttal, and who testified that he was employed by the Dunkley Company in constructing machinery from the first of 1902 to December, 1904. According to the testimony of this witness he designed and built, in August, 1903, a peach-peeling table, for which the plaintiff obtained the patent in suit, and this he did without any ideas from Dunkley as to its construction. In other [232] words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his inven-

tion, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. *'Falsus in uno, falsus in omnibus.'*

"But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting that process. They deny the priority of the Dunkley peach-peeling machine, and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose, it is true for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903, instead of 1902."

Campbell's testimony was not materially different before Judge Trippet but the latter does not advert to the aspect above discussed by the Circuit Court of Appeals, merely closing his consideration of the witness' evidence by saying: "There is no reason [233] in any event for discrediting Campbell." I have carefully reviewed the particulars of the evidence as to which Judge Trippet seems to think it tends to cor-

roborate Campbell but I am wholly unable to change my former conclusion as to his evidence.

Basing his conclusion largely on the evidence of this witness Judge Trippet found the Dunkley patent anticipated and for that reason void. He also found that the device, claimed in that case to be an infringement, did not infringe the Dunkley invention; and it is significant that it was only on this latter ground that the Circuit Court of Appeals affirmed his decree dismissing the bill.

As to Judge Hand's opinion it is devoted largely to a question not here involved—whether defendants were protected by a license set up in defense; and on the question of anticipation he indulges, with a single exception to be noticed, in little original discussion, contenting himself with following and adopting the views of Judge Trippet. He starts out by saying: "After hearing the testimony, I was very clear that the complainant had not a valid patent, and that the decision of Judge Trippet was correct." And referring to Judge Trippet's views on anticipation he says, "Judge Trippet has discussed his testimony carefully and has reached the conclusion that Stewart's testimony that he made the first machine in 1903 is correct." This reference is to Campbell's testimony, the learned Judge inadvertently calling him Stewart—his first name. He then proceeds to some independent discussion and says: "In the various alleged anticipating devices *which were exhibited to me* the one which impressed me most was the Baker-Chalker machine. \* \* \*

The Baker-Chalker machine was not before Judge Van Fleet, and if it had been, supple-



mented by the additional testimony that was before Judge Trippet, I believe he would have had no doubt that a valid prior use was established. \* \* \*

The identity of function between the Baker-Chalker machine *exhibited to me* and that of Dunkley is convincing evidence that the latter contributed nothing to the art which can be regarded [234] as amounting to invention." (Italics volunteered.)

In these extracts Judge Hand has inadvertently fallen into a singular error or misapprehension arising perhaps from the evidence before him having been largely stipulated into the case from the record before Judge Trippet and not heard orally. In the first place there was not before Judge Hand one of the Baker-Chalker machines as relied upon by defendants to anticipate plaintiff's device. What was before Judge Hand was a copy of the old original Baker-Chalker orange-washing device, remodeled or adapted *from memory* by Baker, one of the patentees, to represent that device as the witness testified to seeing it used experimentally in Fresno in 1902 for peeling peaches; and it had been admitted before Judge Trippet solely for illustrative purposes as representing, as nearly as the witness' memory could make it, the device as it was used in Fresno. It found its way before Judge Hand from being stipulated into the record and was only there for the same purposes as used before Judge Trippet. In the next place all of the evidence as to this device, with a single exception, that was before Judge Trippet was before me in the present cases, including that of Baker. The exception was the evidence of one Stebler—referred to by



Judge Hand as Stebley—who saw the device used on one occasion in Fresno in 1902 or 1903 and, testifying purely from memory, said: “Well I observed that it was a new application of the machine [Baker-Chalker] which I had not seen before, and it was being used as I say in which to remove the peel from peaches preparatory to canning and it was done in conjunction with—by using water in conjunction with the brushes.” It will be observed that the witness says nothing about *how* the water was being used and consequently his evidence was entirely valueless as showing anticipation of plaintiff’s patented device, even if otherwise competent. But in fact, under the principles of the Symington case, neither the evidence of Baker nor that of Stebler was competent to anticipate plaintiff’s patent.

Of this Baker-Chalker device I had occasion to say in my oral opinion: “As to the Vernon device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that this device was an anticipation in its essential characteristics. It operated upon a fundamentally different principle. That was an adaptation to the purposes for which the plaintiff’s device was used, that of peeling peaches, of a device by Baker and another for scouring oranges for the market; it had a system of revolving brushes, and it used a saturation or douche of water for the purpose of softening the brushes and of washing the fruit; but the essential operative principle there was the brushes. They were for the purpose of scrubbing and washing the hard outer surface of the skin of the orange and of freeing it from mould and other detrimental sub-

stances which interfered with its marketability, and the essential principle was the operation of the brushes. The water was used, as I have suggested, only for a saturating and washing purpose. I may say, furthermore, that the patent itself did not call for the essential feature which I find characterizes the plaintiff's device, that is, of peeling jets of water, or water admitted at such a high pressure upon the fruit as to act itself as the primary means of washing the skin from the fruit; nor do I think that the manner in which the Vernon patent was used was such as to suggest readily to the mind the idea that peeling jets of water would be efficient for the purpose for which the plaintiff's device was intended. The plaintiff's device operates upon quite a different principle. It has the rotating brushes, but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its [236] disintegration by the lye bath; and I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent."

I may add that I have found nothing in the record, either new or old, tending in any way to change my views as there expressed.

As a result of his conclusions Judge Hand found the patent void for anticipation but he also found that

the defendants held a valid license to use plaintiff's device and for that reason was not infringing. It was upon this latter ground alone that the Circuit Court of Appeals of the Second Circuit affirmed his decree, leaving the question of the validity of the patent untouched. As a result their decree, like that of the Circuit Court of Appeals of this Circuit, lends no aid to defendants on the present motion.

In what has been said above of the adverse conclusions reached by my brother judges I need hardly say that nothing is intended in a spirit of criticism, my sole purpose being to show that the case is not one where I am called upon to accept their conclusions as making in support of the present motion.

In view of the considerations suggested, to grant defendants' motion would, as it seems to me, do violence to a cardinal rule for the guidance of courts, that when parties have had full opportunity to be heard there should be a period to litigation. And in the practical administration of the law a party has had full opportunity to be heard when he has been afforded a fair and reasonable opportunity.

As to the last ground of defendants' motion, that the decrees should be vacated for want of proper parties, it is antagonized by a counter motion by plaintiff to add as plaintiff in the several actions the name of the corporation to whom the present plaintiff's rights have been assigned pending the controversy. Leave to apply to this Court for that privilege was heretofore granted by the Circuit Court of Appeals and, as the right is one which does not inhere in the merits of the controversy but is purely model and

formal that there may be [237] proper parties to sustain a final decree, the plaintiff's motion should be granted.

Accordingly the defendants' motion that this court ask leave to reopen the decrees is denied; that of plaintiff to add the new party is granted.

[Endorsed]: Filed August 22, 1921. Walter B. Maling, Clerk. [238]

---

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 22d day of August, in the year of our Lord one thousand nine hundred and twenty-one. Present, The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 211—Equity.

DUNKLEY COMPANY

vs.

HUNT BROTHERS COMPANY.

**Minutes of Court—August 22, 1921—Order Denying Motion to Reopen Decree and Granting Motion to Add New Party Plaintiff.**

Defendant's motion to reopen the decree and plaintiff's motion to add new party plaintiff heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion, it is ordered



that said motion to reopen the decree be and the same is hereby denied and that the motion to add new party plaintiff be and the same is hereby granted.  
[239]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY —No. 201.

“DUNKLEY COMPANY” (Now Known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

CENTRAL CALIFORNIA CANNERIES COM-  
PANY,

Defendant.

**Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for the defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above-entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and



papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, upon defendant giving a bond in the sum of Two Hundred Fifty (\$250.00) Dollars, with good and sufficient surety to be approved by the court, conditioned [240] that defendant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20th, 1921.

WM. C. VAN FLEET,  
Judge. [241]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 201.

“DUNKLEY COMPANY” (Now Known as the Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Plaintiffs,

vs.

CENTRAL CALIFORNIA CANNERIES COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

The Central California Canneries Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above-entitled suit of August

22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such motion and to the continuing in effect of such injunction and defendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, Central California Canneries Company, an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be made fixing the amount of security which defendant shall give and [242] that an order be made fixing the amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Errors setting up separately and particularly each error asserted and intended to be urged in the United States Circuit

Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

CENTRAL CALIFORNIA CANNERIES  
COMPANY,

By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Its Attorneys. [243]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 201.

“DUNKLEY COMPANY” (Now Known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

CENTRAL CALIFORNIA CANNERIES COM-  
PANY,

Defendant.

**Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff

to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the injunction herein:

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

I. In granting plaintiff's said motion.

II. In denying defendant's said motion.

III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company (now known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory Decree, and all proceedings subsequent to such assignment [244] were and are void, nugatory and of no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Inter-



locutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said injunction, without giving defendant a right to a trial and a right to offer and prove its defence.

VIII. In not vacating and setting aside the Interlocutory Decree and injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States. [245]

WHEREFORE, the said defendant prays that the said order of this Court, and the said Interlocutory Decree and the said injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.



All of which is respectfully submitted,

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [246]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 202.

“DUNKLEY COMPANY” (Now Known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GRIFFIN & SKELLEY COMPANY,

Defendant.

**Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above-entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein

on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the court conditioned that defendant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20, 1921.

WM. C. VAN FLEET,  
Judge. [247]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 202.

“DUNKLEY COMPANY” (Now Known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GRIFFIN & SKELLEY COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

The Griffin & Skelley Company, defendant in the

above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above-entitled suit on August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such motion and to the continuing in effect of such injunction and defendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, Griffin & Skelley Company, an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits, and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an [248] order be made fixing the amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Error setting up separately and particularly each error asserted and

intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will every pray, etc.

GRIFFIN & SKELLEY COMPANY,

By FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

WILLIAM J. CARR,

FREDERICK S. LYON,

Its Attorneys. [249]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 202.

“DUNKLEY COMPANY” (Now Known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GRIFFIN & SKELLEY COMPANY,

Defendant.

**Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered,



granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the injunction herein:

That said District Court of the United States, afore-said, in making, filing and entering said order, erred as follows:

I. In granting plaintiff's said motion.

II. In denying defendant's said motion.

III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company (now known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory [250] Decree, and all proceedings subsequent to such assignment were are void, nugatory and of no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Inter-



locutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving defendant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in [251] accordance with the laws of the United States.

WHEREFORE, the said defendant prays that the said order of this Court, and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [252]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 205.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company,) and  
DUNKLEY COMPANY

Plaintiffs,

vs.

J. C. AINSLEY PACKING COMPANY,

Defendant.

**Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for the defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant

giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the Court conditioned that defendant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated San Francisco, California, September 20, 1921.

WM. C. VAN FLEET,  
Judge. [253]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 205.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company,) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

**Petition for Order Allowing Appeal.**

The J. C. Ainsley Packing Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above entitled suit of August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the

opposition and objections of defendant to such motion and to the continuing in effect of such injunction and defendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, J. C. Ainsley Packing Company, an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth [254] Circuit; also that an order be made fixing the amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignment of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

J. C. AINSLEY PACKING COMPANY,  
By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant [255]



In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 205.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

v.

J. C. AINSLEY PACKING COMPANY,

Defendant.

### **Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the Injunction herein:

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

- I. In granting plaintiff's said motion.
- II. In denying defendant's said motion.
- III. In not holding and ordering that by reason



of the original plaintiff herein, Dunkley Company (now known as Michigan Canning and Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory Decree, and all proceedings subsequent to such assignment were and are void, nugatory and of [256] no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title of interest in or entitled to such Interlocutory Decree or to said Injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving de-

fendant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE the said defendant prays that the said order [257] of this court and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [258]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 206.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

ANDERSON-BARNGROVER MANUFACTUR-  
ING COMPANY,

**Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal and the filing of the assignments of error accompanying the same, on motion Frederick S. Lyon, Esq., attorney for defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the court conditioned that defendant

shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20th, 1921.

WM. C. VAN FLEET,  
Judge. [259]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 206.

“DUNKLEY COMPANY” (Now known as the  
Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

ANDERSON-BARNGROVER MANUFACTUR-  
ING COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

The Anderson-Barngrover Mfg. Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above entitled suit of August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of de-



defendant to such motion and to the continuing in effect of such injunction and defendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, Anderson-Barngrover Mfg. Company, an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be made fixing the amount of [260] security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

ANDERSON-BARNGROVER MFG.  
COMPANY,

By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Its Attorneys [261]



In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 206.

“DUNKLEY COMPANY” (Now Known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

ANDERSON-BARNGROVER MFG. COM-  
PANY,

Defendant.

**Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the injunction herein:

That said District Court of the United States, afore-said, in making, filing and entering said order, erred as follows:

- I. In granting plaintiff's said motion.
- II. In denying defendant's said motion.

III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company (now known as the Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory Decree, and all proceedings subsequent to such assignment [262] were are void, nugatory and of no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said Injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving defend-

ant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE, the said defendant prays that the said [263] order of this Court, and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [264]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 209.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

**Order Allowing Appeal.**

Upon the filing of the Petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for the defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above-entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, upon defendant giving a bond in the sum of \$250.00, with good and sufficient surety to be approved by the Court, condi-

tioned that defendant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20th, 1921.

WM. C. VAN FLEET,  
Judge. [265]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 209.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

**Petition for Order Allowing Appeal.**

The Golden Gate Packing Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above entitled suit on August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such



motions and to the continuing in effect of such injunction and defendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, the Golden Gate Packing Company, an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be [266] made fixing the amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

GOLDEN GATE PACKING COMPANY,

By FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

WILLIAM J. CARR,

FREDERICK S. LYON. [267]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 209.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

GOLDEN GATE PACKING COMPANY,

Defendant.

**Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the Injunction herein;

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

- I. In granting plaintiff's said motion.
- II. In denying defendant's said motion.
- III. In not holding and ordering that by reason

of the original plaintiff herein, Dunkley Company (now known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory Decree, and all proceedings subsequent to such assignment were and are void, nugatory and of [268] no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said Injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving de-

fendant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE the said defendant prays that the said order [269] of this court and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [270]



In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 210.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

J. F. PYLE & SON, INC.,

Defendant.

### **Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above-entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits, and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the court conditioned that defend-



ant shall answer all costs which may be adjudged against it if it fail to make its said appeal good.

Dated, San Francisco, California, September 20, 1921.

WM. C. VAN FLEET,  
Judge. [271]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 210.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

J. F. PYLE & SON, INC.,

Defendant.

**Petition for Order Allowing Appeal.**

The J. F. Pyle & Son., Inc., defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above entitled suit on August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such motion and to the continuing in effect of such injunction and defend-

ant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, J. F. Pyle & Son, Inc., an appeal from said order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be made fixing the [272] amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

J. F. PYLE & SON, INC.,  
By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Its Attorneys. [273]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 210.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Plaintiffs,

vs.

J. F. PYLE & SON, INC.,

Defendant.

### **Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the injunction herein:

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

I. In granting plaintiff's said motion.

II. In denying defendant's said motion.

III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company (now

known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory [274] Decree, and all proceedings subsequent to such assignment were are void, nugatory and of no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said Injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving defendant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proof between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in [275] accordance with the laws of the United States.

WHEREFORE, the said defendant prays that the said order of this Court, and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted,

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [276]



In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 211.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

HUNT BROTHERS COMPANY,

Defendant.

### **Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above-entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the court conditioned that defend-

ant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20th, 1921.

WM. C. VAN FLEET,  
Judge. [277]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Second Division.

IN EQUITY—No. 211.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

HUNT BROTHERS COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

The Hunt Brothers Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the above entitled suit on August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such motion and to the continuing in effect of such injunction and de-

fendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, Hunt Brothers Company, an appeal from said order, to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be made fixing [278] the amount of security which defendants shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignment of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

HUNT BROTHERS COMPANY.

By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Its Attorneys. [279]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 211.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

.. Plaintiffs,

vs.

HUNT BROS. COMPANY,

Defendant.

### **Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the injunction herein:

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

I. In granting plaintiff's said motion.

II. In denying defendant's said motion.

III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company



(now known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory [280] Decree, and all proceedings subsequent to such assignment were are void, nugatory and of no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the court having any right, title or interest in or entitled to such Interlocutory Decree or to said injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving defendant a right to a trial and a right to offer and prove its defense.



VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in [281] accordance with the laws of the United States.

WHEREFORE, the said defendant prays that the said order of this Court, and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [282]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 212.

“DUNKLEY COMPANY” (now known as Michi-  
gan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

SUNLIT FRUIT COMPANY,

Defendant.

**Order Allowing Appeal.**

Upon the filing of the petition for order allowing appeal, and the filing of the assignments of error accompanying the same, on motion of Frederick S. Lyon, Esq., attorney for defendant, it is ordered that an appeal be and the same is hereby allowed the defendant, in the above entitled suit to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on August 22d, 1921, allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon defendant giving a bond in the sum of \$250.00 with good and sufficient surety to be approved by the court conditioned that defend-

ant shall answer all costs which may be adjudged against it if it fails to make good its said appeal.

Dated, San Francisco, California, September 20th, 1921.

WM. C. VAN FLEET,  
Judge. [283]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 212.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

SUNLIT FRUIT COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

The Sunlit Fruit Company, defendant in the above-entitled suit, conceiving itself aggrieved by the interlocutory order or decree made, filed and entered in the about entitled suit on August 22d, 1921, granting the motion of the plaintiff that Dunkley Company be added as a party plaintiff in said suit, to the end that the injunction heretofore ordered in said suit be continued in force and effect and defendant enjoined as in and by said injunction set forth, and the opposition and objections of defendant to such motion and to the continuing in effect of such injunction and de-

fendant's motion to vacate and set aside the interlocutory decree and injunction was and were overruled and denied, comes now, by Francis J. Heney, Kemper B. Campbell, William J. Carr and Frederick S. Lyon, its attorneys, and petitions this Court for an order allowing it, Sunlit Fruit Company, an appeal from said order, to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and pursuant to the laws in that behalf made and provided; and that a transcript of the record, testimony, exhibits and all proceedings and papers upon which said order was made, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; also that an order be made [284] fixing the amount of security which defendant shall give and furnish to cover any and all costs which may be adjudged against it by reason of such appeal in the event such appeal is not sustained.

And now at the time of filing and presenting this petition for order allowing said appeal defendant presents and files its Assignments of Error setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray, etc.

SUNLIT FRUIT COMPANY,

By FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Its Attorneys. [285]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 212.

“DUNKLEY COMPANY” (now known as Michigan Canning & Machinery Company) and  
DUNKLEY COMPANY,

Plaintiffs,

vs.

SUNLIT FRUIT COMPANY,

Defendant.

### **Assignments of Error.**

Comes now defendant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 22d, 1921, granting the motion of plaintiff to make or add as a party plaintiff Dunkley Company and continue the injunction heretofore ordered, granted and issued in force and effect and overruling and denying defendant's motion to set aside and vacate the Interlocutory Decree and the Injunction herein.

That said District Court of the United States, aforesaid, in making, filing and entering said order, erred as follows:

- I. In granting plaintiff's said motion.
- II. In denying defendant's said motion.
- III. In not holding and ordering that by reason of the original plaintiff herein, Dunkley Company



(now known as Michigan Canning & Machinery Company), having assigned all right, title and interest in and to the patent in suit and in the matters in suit prior to the decision of this suit by said District Court, and prior to the entry of said Interlocutory Decree, the said decision, and the said Interlocutory Decree, and all proceedings subsequent to such assignment were and are void, nugatory and of [286] no effect.

IV. In not holding, ordering and decreeing that by reason of the said assignment and transfer of the exclusive right, title and interest in and to the patent in suit prior to the decision of this suit by this Court and prior to the entry of the said Interlocutory Decree herein this suit abated and that said Interlocutory Decree was nugatory and void and must be set aside and vacated, and the cause set down for trial and determination on proofs to be offered upon behalf of the parties.

V. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that there is now a misjoinder of parties plaintiff.

VI. In not vacating and setting aside said Interlocutory Decree and said Injunction for the reason that at the time of the entry and granting thereof there was no party plaintiff in this cause before the Court having any right, title or interest in or entitled to such Interlocutory Decree or to said Injunction.

VII. In granting plaintiff's said motion and giving full force and effect to the said Interlocutory Decree and to the said Injunction, without giving defendant a right to a trial and a right to offer and prove its defense.

VIII. In not vacating and setting aside the Interlocutory Decree and Injunction herein as nugatory and void and placing this suit for hearing and trial upon its merits upon proper pleadings and proofs between and on behalf of the Dunkley Company, as assignee of the original plaintiff, and this defendant.

In order that the foregoing assignments of error may be and appear of record, defendant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE the said defendant prays that the said order [287] of this court and the said Interlocutory Decree and the said Injunction, and each thereof, be reversed, vacated and set aside, and that this Court be ordered and directed to so vacate and set aside the same and each thereof.

All of which is respectfully submitted.

FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [288]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 201.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiff,  
vs.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of  
the State of Maryland, and duly licensed to transact  
business in the State of California, is held and firmly  
bound unto plaintiffs Michigan Canning & Ma-  
chinery Company (formerly known as Dunkley Com-  
pany), and Dunkley Company, in the penal sum of  
Two Hundred Fifty (\$250.00) Dollars, to be paid  
to the said Michigan Canning & Machinery Company  
and Dunkley Company, their successors and assigns,  
for which payment, well and truly to be made, the  
Maryland Casualty Company, binds itself, its succes-  
sors and assigns, firmly by these presents.

Sealed with its corporate seal and dated this 19th  
day of September, 1921.

The condition of this obligation is such that whereas  
the Central California Canneries Company, the de-  
fendant in the above-entitled suit, is about to take an  
appeal to the United States Circuit Court of Appeals

for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and [289] Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY (Seal)

By FRANK J. WALLACE,

*Attorney-fact.*

(Premium charge, \$10.00 per annum.)

State of California,

City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of  
San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20th, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [290]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 202.

**"DUNKLEY COMPANY"** (Now known as  
Michigan Canning & Machinery Company)  
and **DUNKLEY COMPANY**, Plaintiffs,  
vs.

GRIFFIN & SKELLEY COMPANY,  
 Defendant.

### Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of  
the State of Maryland, and duly licensed to transact  
business in the State of California, is held and firmly



bound unto plaintiffs Michigan Canning & Machinery Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and [291] Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

*Attorney-fact.*

(Premium charge, \$10.00 per annum.)

State of California,

City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal]

JESSE M. WHITED,

Notary Public in and for the City and County of  
San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20th, 1921.

VAN FLEET,

Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [292]

In the Southern Division of the United States District Court for the Northern District of California, Southern Division.

IN EQUITY—No. 205.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiffs,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Plaintiffs Michigan Canning & Machinery Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and [293] Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

*Attorney-in-fact.*

(Premium charge, \$10.00 per annum.)

State of California,  
City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20th, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [294]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 206.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiffs,  
vs.

ANDERSON-BARNGROVER MFG. COM-  
PANY, Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of  
the State of Maryland, and duly licensed to transact  
business in the State of California, is held and firmly



bound unto plaintiffs Michigan Canning & Machinery Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and [295] Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

*Attorney-fact.*

(Premium charge \$10.00 per annum.)

State of California,  
City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of San  
Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20th, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [296]

In the Southern Division of the United States District Court for the Northern District of California, Southern Division.

IN EQUITY—No. 209.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiffs,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto plaintiffs Michigan Canning & Machinery Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals

for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and [297] Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make goods its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

*Attorney-fact.*

(Premium charge \$10.00 per annum.)

State of California,

City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of San  
Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20th, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [298]

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 210.

**“DUNKLEY COMPANY”** (Now known as  
Michigan Canning & Machinery Company)  
and **DUNKLEY COMPANY**, Plaintiff,  
vs.

J. F. PYLE & SON, INC. Defendant.

### Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That Maryland Casualty Company, a corporation of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto plaintiffs Michigan Canning & Machinery



Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made, filed and entered on August 22d, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and Injunction against defendant: Now, therefore, if the said defendant shall [299] prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

Attorney-in-Fact.

(Premium charge \$10.00 per annum.)

State of California,  
City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [300]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 211.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiffs,  
vs.

HUNT BROS. COMPANY, Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto plaintiffs Michigan Canning & Machinery Company (formerly known as Dunkley Company), and Dunkley Company, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made, filed

and entered on August 22nd, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and [301] objection to said motion and overruling and denying motion to vacate and set aside the Interlocutory Decree and Injunction against defendant: Now, therefore, if the said defendant shall prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY,

By FRANK J. WALLACE,

Attorney-in-fact.

(Premium charge \$10.00 per annum.)

State of California,

City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse W. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal at my office in the



City and County of San Francisco, in the day and year in this certificate first above written.

[Seal] JESSE M. WHITED,  
Notary Public in and for the City and County of San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [302]

---

In the Southern Division of the United States District  
Court for the Northern District of California,  
Southern Division.

IN EQUITY—No. 212.

“DUNKLEY COMPANY” (Now known as  
Michigan Canning & Machinery Company)  
and DUNKLEY COMPANY, Plaintiff,  
vs.

SUNLIT FRUIT COMPANY, Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Maryland Casualty Company, a corporation of  
the State of Maryland, and duly licensed to transact  
business in the State of California, is held and firmly  
bound unto plaintiffs Michigan Canning & Machin-  
ery Company (formerly known as Dunkley Com-  
pany), and Dunkley Company, in the penal sum of



Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Michigan Canning & Machinery Company and Dunkley Company, their successors and assigns, for which payment, well and truly to be made, the Maryland Casualty Company, binds itself, its successors and assigns by these presents.

Sealed with its corporate seal and dated this 19th day of September, 1921.

The condition of this obligation is such that whereas the Central California Canneries Company, the defendant in the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order made, filed and entered on August 22nd, 1921, in the above-entitled suit, granting and allowing plaintiff's motion that Dunkley Company be made or added as a party plaintiff in said suit and overruling and denying defendant's opposition and objection to said motion and overruling and denying defendant's motion to vacate and set aside the Interlocutory Decree and Injunction against defendant: Now, therefore, if the said defendant shall [303] prosecute its said appeal to effect and answer all costs which may be adjudged against it, if it fail to make good its said appeal, this obligation shall be void; otherwise to remain in full force and effect.

MARYLAND CASUALTY COMPANY, (Seal)

By FRANK J. WALLACE,

Attorney-in-fact.

(Premium charge \$10.00 per annum.)

State of California,  
City and County of San Francisco,—ss.

On this 20th day of September, in the year one thousand nine hundred and twenty-one, before me, Jesse M. Whited, a notary public in and for the City and County of San Francisco, personally appeared Frank J. Wallace, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal]

JESSE M. WHITED,

Notary Public in and for the City and County of San Francisco, State of California.

The within bond and the surety thereon is hereby approved this September 20, 1921.

VAN FLEET,  
Judge.

[Endorsed]: Filed Sept. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [304]

(Title of Court and Causes.)

**Praecipe for Transcript of Record on Appeal.**

To the Clerk of said Court:

Please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies of the following, the same to constitute the transcript on appeal to the said United States Circuit Court of Appeals on defendant's appeal from that certain order of the Court entered August 22, 1921, granting plaintiff's motion that "the said new Dunkley Company be made a party plaintiff herein", and entitled "motion made pursuant to permission given in the mandate of the United States Circuit Court of Appeals", said order being as follows, to wit:

"Defendant's motion to reopen the decree and plaintiff's motion to add new party plaintiff heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion, it is ordered that said motion to reopen the decree be and the same is hereby denied and that the motion to add new party plaintiff be and the same is hereby granted."

1. Order of the Court made and entered on or about the 6th day of April, 1916, that said cause stand submitted.
2. Motion by defendants in each of the above cases and entitled "Application for a request to the Circuit Court of Appeals to recall its mandate, and for a rehearing", filed on or about the 14th day of October, 1918.
3. Motion by plaintiff made in each of the above cases and entitled "Motion made pursuant to per-

mission [305] given in the mandate of the United States Circuit Court of Appeals", and filed on or about the 17th day of July, 1918.

4. The following affidavits filed by defendants in said cases and used upon the hearing of said motions. Affidavits of:

Augensen, August M.

Augensen, August M. (supplemental)

Brazill, Thomas B.

Breen, Katherine

Brown, Geo. K.

Brown, Geo. K. (supplemental)

Brown, Mrs. Geo. K.

Buckley, Fred J.

Campbell, Kemper

Campbell, Stewart

Clark, Robert H.

Crosthwaite, L.

Crosthwaite, L. (two affidavits)

De Loof, Martin H.

De Pue, Chas.

De Pue, Mrs. Chas.

Funk, Clyde M.

Geiger, Wm. A.

Grier, G. E.

Harold, George

Harold, Mrs. George

Hetherington, John; John Hetherington (supplemental)

Hinterliter, William

Hinterliter, Mary

Hodgson, John

Howes, Maud  
 Hycoop, Jacob  
 Janashak, Dorothy  
 Kern, Leander  
 Kern, Mrs. Leander  
 Kreugler, Mrs. Ed.  
 Mapes, Edwin B.  
 McEwing, Wm.  
 McFarland, Bert.  
 Miller, John C.  
 Moore, Eleanor  
 Myhan, George H.  
 Newton, Chas.  
 Newton, Robert  
 Norton, Arthur W.  
 Norton, Arthur W. (supplemental)  
 Noud, John F.  
 Plating, Nicholas  
 Plating, Nicholas (two affidavits)  
 Payne, Louis  
 Robinson, Daniel P.  
 Spencer, Wm. C.  
 Stafford, Mrs. Mary J.  
 Stebler, Fred [306]  
 Stewart, Harrie  
 Triage, Wm.  
 Vanderbrook, Abe  
 Van Ostrand, S.  
 Webb, Estelle (Mrs. Frank)  
 Weed, Mrs. Nellie  
 White, Wm. K.



5. Opinion of the Court filed August 22, 1921.
6. Order of the Court entered August 22, 1921.
7. Petition of Hunt Brothers Company for order allowing appeal.
8. Assignment of errors, this appeal.
9. Order allowing appeal of Hunt Brothers Company.
10. Bond on this appeal.
11. Citation, this appeal.
12. Stipulation respecting form of record on this appeal and entitled in all of said cases, and heretofore filed.

FREDERICK S. LYON,  
KEMPER B. CAMPBELL,  
W. J. CARR,  
FRANCIS J. HENEY,  
Solicitors for Defendant.

Received copy of Praeceptum this 28th day of December, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Solicitors for Plaintiff.

[Endorsed]: Filed Dec. 29, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [307]

---

(Title of Court and Causes.)

**Stipulation Respecting Form of Record on Appeal  
and Hearing of Appeal From That Certain  
Order of the Court Entered August 22, 1921,  
in Each of the Above Cases.**

WHEREAS, the defendants have taken an appeal

in each of the above-entitled cases to the United States Circuit Court of appeals for the Ninth Circuit from that certain order of the Court entered in each of said cases on the 22d day of August, 1921, to wit:

“Defendant’s motion to reopen the decree and plaintiff’s motion to add new party plaintiff heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion, it is ordered that said motion to reopen the decree be and the same is hereby denied and that the motion to add new party plaintiff be and the same is hereby granted.”

WHEREAS, pursuant to the stipulation of all the above-named parties, the motion by plaintiff entitled “Motion made pursuant to permission given in the Mandate of the United States Circuit Court of Appeals”, and the motion by each of the defendants above-named entitled “Motion—Application for a Request to the Circuit Court of Appeals to recall its Mandate and for a Rehearing”, were made in all of the above entitled cases, and were heard, tried and determined at the same time and upon the same evidence, proofs and records, and a similar order was entered thereon in each of said causes;

And whereas said evidence, proofs and records include the transcript of record and transcript on appeal in the case of Dunkley Company and Michigan Canning & Machinery Company, Appellants, vs. Pasadena Canning Company and Geo. E. Grier, Appellees, in the United States Circuit Court of Appeals for the Ninth Circuit, No. 3316, together with the briefs, and documentary, mechanical, photographic and other ex-

hibits on file therein, and now a part of the files and records of this [308] court; and include the transcript of record and the transcript on appeal in the case of Central California Canneries Company Inc., Griffin & Skelley Company, J. C. Ainsley Packing Company, Anderson-Barngrover Manufacturing Company, Golden Gate Packing Company, J. F. Pyle & Son Inc., Sunlit Fruit Company and Hunt Brothers Company, Appellants, vs. Dunkley Company, a corporation, Appellee, No. 2915 in the United States Circuit Court of Appeals for the Ninth Circuit, together with the briefs, and documentary photographic, mechanical and other exhibits, on file therein and now a part of the files and records of this court; and include a transcript of record in the case of Dunkley Company, Complainant vs. California Packing Corporation, Defendant, No. 572 in the United States District Court, Southern District of New York, together with the briefs, and documentary exhibits entitled "Dunkley Pay-rolls, 1902"; "Dunkley Pay-rolls, 1903"; and "Dunkley Pay-rolls, 1904"; and include the affidavits of the following:

Augensen, August M.

Augensen, August M. (supplemental)

Brazill, Thomas B.

Breen, Katherine

Brown, Geo. K.

Brown, Geo. K. (supplemental)

Brown, Mrs. Geo. K.

Buckley, Fred J.

Campbell, Kemper

Campbell, Stewart

Clark, Robert H.  
 Crosthwaite, L.  
 Crosthwaite, L. (two affidavits)  
 De Loof, Martin H.  
 De Pue, Chas.  
 De Pue, Mrs. Chas.  
 Funk, Clyde M.  
 Geiger, Wm. A.  
 Grier, G. E.  
 Harold, George  
 Harold, Mrs. George  
 Hetherington, John  
 Hetherington, John (supplemental)  
 Hinterliter, William  
 Hinterliter, Mary [309]  
 Hodgson, John  
 Howes, Maud  
 Hycoop, Jacob  
 Janashak, Dorothy  
 Kern, Leander  
 Kern, Mrs. Leander  
 Kreugler, Mrs. Ed.  
 Mapes, Edwin B.  
 McEwing, Wm.  
 McFarland, Bert  
 Miller, John C.  
 Moore, Eleanor  
 Myhan, George H.  
 Newton, Chas.  
 Newton, Robert  
 Norton, Arthur W.  
 Norton, Arthur W. (supplemental)

Noud, John F.  
Plating, Nicholas  
Plating, Nicholas (two affidavits)  
Payne, Louis  
Robinson, Daniel P.  
Spencer, Wm. C.  
Stafford, Mrs. Mary J.  
Stebler, Fred  
Stewart, Harrie  
Triece, Wm.  
Vanderbrook, Abe  
Van Ostrand, S.  
Webb, Estelle (Mrs. Frank)  
Weed, Mrs. Nellie  
White, Wm. K.

all of the foregoing being filed in support of defendant's motion "application for a request to the Circuit Court of Appeals to recall its mandate, and for a rehearing"; and in opposition to plaintiff's motion, the order granting which is herein appealed from:

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED as follows:

I. All of said respective appeals taken by the respective defendants in the above-entitled cases from said order of August 22, 1921, made and entered in each of said cases, may and shall be heard upon one and the same record on appeal.

II. Said printed transcript of record shall not include [310] the bill of complaint, answer to the bill of complaint, opinion of the Court rendered Monday, December 4, 1916, nor the interlocutory decree filed December 8, 1916, it being stipulated that the bills of



complaint, answers thereto, opinions of the court and interlocutory decrees in all of the above-entitled causes are the same as and identical with the corresponding papers and records on file in this court and in the transcript of record in said case of Central California Canneries Company, a corporation, et al, Appellants, vs. Dunkley Company, Appellee, No. 2915 (with the exception of the respective names of the parties defendant in each of said cases); and it is stipulated that the bill of complaint, answer to the bill of complaint, opinion of the Court rendered Monday, December 4, 1916, and the interlocutory decree filed December 8, 1916, as the same appear in the transcript of record in said case of Central California Canneries Company, a Corporation, et al, Appellants, vs. Dunkley Company, Appellee, No. 2915, shall be and constitute a part of the transcript of record herein, and the same may be referred to for the terms of said bills of complaint, answers thereto, opinions of the Court and interlocutory decrees.

III. That all of the exhibits, documentary, photographic and mechanical, filed with the clerk upon the hearing of said motions, may be withdrawn from the files of the above-entitled court, and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of said record on this appeal, said exhibits including in part said evidence, proofs and records in the above recitals enumerated. That in order to have available the numerous photographic exhibits attached to said affidavits without the necessity of reprinting the [311] same, the clerk of the above-

entitled court be requested to bind said affidavits in a convenient form, arranging them alphabetically, and transmit the same with the other said exhibits.

IV. That said transcript of record on appeal shall include a copy of:

1. Order of the above-entitled court made and entered on or about the 6th day of April, 1916, that said cause stand submitted.

2. Motion by defendant in each of the above cases, entitled "Application for a Request to the Circuit Court of Appeals to recall its Mandate, and for a Rehearing", filed on or about the 14th day of October, 1918.

3. Motion by plaintiff made in each of the above cases, and entitled "Motion made pursuant to Permission given in the Mandate of the United States Circuit Court of Appeals, and filed on or about the 17th day of July, 1918.

4. The affidavits hereinabove listed (exclusive of photographic exhibits).

5. Opinion of the Court, filed August 22, 1921.

6. Order of the Court, entered August 22, 1921.

7. Petition of Hunt Brothers Company for order allowing appeal.

8. Assignment of errors, this appeal.

9. Order allowing appeal of Hunt Brothers Company.

10. Bond on this appeal.

11. Citation, this appeal.

12. This stipulation.

Nothing in this stipulation or in any other stipulation contained shall be construed as a waiver by plaintiffs of any [312] right of plaintiffs to move to dis-

miss said appeals or a waiver of any right plaintiffs may have.

KEMPER B. CAMPBELL,  
FREDERICK S. LYON,  
WILLIAM J. CARR,  
FRANCIS J. HENEY,

Solicitors for Defendants.

FRED L. CHAPPELL and  
W. A. RICHARDSON,

Solicitors for Plaintiffs.

December 28, 1921.

It is so ordered.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Dec. 29, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [313]

---

In the Southern Division of the United States District  
Court, in and for the Northern District of Cali-  
fornia, Second Division.

No. 211—IN EQUITY.

DUNKLEY COMPANY, Plaintiff,  
vs.

HUNT BROTHERS COMPANY, Defendant.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record on Appeal.**

I, Walter B. Maling, Clerk of the District Court  
of the United States, in and for the Northern District  
of California, do hereby certify the foregoing three

hundred thirteen (313) pages numbered from 1 to 313, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause and similar causes, excepting therefrom the original exhibits (which by order of Court are allowed to be withdrawn and transmitted herewith as a part of this record), and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$120.90; that said amount was paid by the defendants; and that the original citations issued herein are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 5th day of January, A. D. 1922.

[Seal]

WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [314]

---

### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San



Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Central California Canneries Company, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge. [315]

Due service and receipt of a copy of the within citation is hereby admitted the Sept. 21st, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 201. United States District Court For the Northern District of California. Central California Canneries Co., Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22, 1921. Walter B. Maling, Clerk.



**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Griffin & Skelley Company, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge. [316]

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 202. United States District Court, For the Northern District of California. Griffin & Skelley Company, Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22, 1921. Walter B. Maling, Clerk.

---

### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein J. C. Ainsley Packing Company, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 205-Eq. United States District Court For the Northern District of California. J. C. Ainsley Packing Co., Appellant, vs. Dunkley Co., etc. et al. Citation on Appeal. Filed Sept. 22, 1921. Walter B. Maling, Clerk. [317]

---

### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Anderson-Barngrover Manufacturing Company, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 206. United States District Court for the Northern District of California. Anderson-Barngrover Mnfg. Co., Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22d, 1921. Walter B. Maling, Clerk. [318]

---

### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.  
The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Golden Gate Packing Com-

pany is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 209. United States District Court for the Northern District of California. Golden Gate Packing Co., Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22, 1921. Walter B. Maling, Clerk. [319]

---

### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and



appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein J. F. Pyle & Son, Inc., is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 210. United States District Court for the Northern District of California. J. F. Pyle & Son, Inc., Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22d, 1921. Walter B. Maling, Clerk. [320]

**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company), and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Hunt Brothers Company is appellant, and you are appellees, to show cause, if any there by, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 211. United States District Court for the Northern District of California. Hunt Brothers Company, Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22d, 1921. Walter B. Maling, Clerk. [321]

---

**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley Company (now known as Michigan Canning & Machinery Company) and Dunkley Company,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Sunlit Fruit Company is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of September, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted Sept. 21, 1921.

FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Attorneys for Plaintiffs.

[Endorsed]: No. 212. United States District Court for the Northern District of California. Sunlit Fruit Co., Appellant, vs. Dunkley Co. etc. et al. Citation on Appeal. Filed Sept. 22, 1921. Walter B. Maling, Clerk. [322]

---

[Endorsed]: No. 3824. United States Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. Griffin & Skelley Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. J. C. Ainsley Packing Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. Anderson-Barngrover Manufacturing Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. Golden Gate Packing Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. J. F. Pyle & Son, Inc., Appellant, vs. Dunkley Company (Now Known as Michigan

Canning & Machinery Company) and Dunkley Company, Appellees. Hunt Brothers Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. Sunlit Fruit Company, Appellant, vs. Dunkley Company (Now Known as Michigan Canning & Machinery Company) and Dunkley Company, Appellees. Transcript of Record. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 5, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By PAUL P. O'BRIEN,  
Deputy Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

3824.

HUNT BROTHERS COMPANY, Appellant,  
vs.

DUNKLEY COMPANY, Appellee.

CENTRAL CALIFORNIA CANNERIES  
COMPANY, Appellant,  
vs.

DUNKLEY COMPANY, Appellee.



GRIFFIN & SKELLEY COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY, Appellee.

J. C. AINSLEY PACKING COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY, Appellee.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY, Appellant,

vs.

DUNKLEY COMPANY, Appellee.

GOLDEN GATE PACKING COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY, Appellee.

J. F. PYLE & SON, INC., Appellant,

vs.

DUNKLEY COMPANY, Appellee.

SUNLIT FRUIT COMPANY, a Corporation,  
Appellant,

vs.

DUNKLEY COMPANY, Appellee.

**Stipulation re Record on Appeal.**

IT IS HEREBY STIPULATED AND  
AGREED by and between the parties to the above-  
entitled suits that the respective appeals herein are

to be docketed and heard upon one and the same record, and that the records in all of the above-entitled cases are identical.

It is stipulated that exhibits, documentary, photographic and mechanical, filed in the court below in the matter which was the subject of this appeal, and transmitted to the clerk of this court, shall constitute and be considered a part of the record on appeal in said cases, and shall be used and referred to by the parties on the hearing of said appeals, and that the records of this court, and the complete files thereof, in the case of Central California Canneries Company, Appellant, vs. Dunkley Company, Appellee, No. 2915; and in the case of Dunkley Company and Michigan Canning & Machinery Company, Appellants, vs. Pasadena Canning Company and Geo. E. Grier, Appellees, No. 3316, including all proofs, files, records and exhibits in said cases, shall be deemed a part of the record on this appeal and need not be reprinted.

Dated, Dec. 28, 1921.

FREDERICK S. LYON,  
KEMPER B. CAMPBELL,  
W. J. CARR,  
FRANCIS J. HENEY,  
Solicitors for Appellants.  
FRED L. CHAPPELL,  
W. A. RICHARDSON,  
Solicitors for Appellee.

[Endorsed]: 3824. In the United States Circuit Court of Appeals for the Ninth Circuit. Hunt Brothers Company, Appellant, vs. Dunkley Company,

Appellee. Stipulation re Record on Appeal. Filed Jan. 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 201.

DUNKLEY COMPANY,

Plaintiff-Appellee,

vs.

CENTRAL CALIFORNIA CANNERIES

COMPANY, Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,

United States Circuit Judge.

[Endorsed]: No. 3824. Equity—No. 201. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Central California Canneries Company, Defendant-

Appellant. Order Extending Time to Docket Appeal and File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 202.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

GRIFFIN & SKELLEY COMPANY,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed]: Equity—No. 202. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Griffin & Skelley Company, Defendant-Appellant. Order Ex-

tending Time to Docket Appeal and File Record  
With the Clerk of This Court. Filed Oct. 18, 1921.  
F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D.  
Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 205.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

J. C. AINSLEY PACKING COMPANY,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S.  
Lyon, one of the attorneys for defendant-appellant,  
and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within  
which defendant-appellant shall docket its appeal  
herein and file the record thereof with the clerk of  
this court be and the same is hereby enlarged and  
extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed: No. 3824. Equity—No. 205. In the  
United States Circuit Court of Appeals for the Ninth  
Circuit. Dunkley Company, Plaintiff-Appellee, vs.  
J. C. Ainsley Packing Company, Defendant-Appel-  
lant. Order Extending Time to Docket Appeal and



File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 206.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

ANDERSON-BARNGROVER MANU-  
FACTURING COMPANY,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed]: No. 3824. Equity—No. 206. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Anderson-Barngrover Manufacturing Company, De-

defendant-Appellant. Order Extending Time to Docket Appeal and File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 209.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

GOLDEN GATE PACKING COMPANY,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed]: No. 3824. Equity—No. 209. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Golden Gate Packing Company, Defendant-Appel-

lant. Order Extending Time to Docket Appeal and File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 210.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

J. F. PYLE & SONS, INC.,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed]: No. 3824. Equity—No. 210. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. J. F. Pyle & Sons, Inc., Defendant-Appellant.

Order Extending Time to Docket Appeal and File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 211.

DUNKLEY COMPANY, Plaintiff-Appellee,

vs.

HUNT BROTHERS COMPANY,

Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,

United States Circuit Judge.

[Endorsed]: No. 3824. Equity—No. 211. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Hunt Brothers Company, Defendant-Appellant. Order Extending Time to Docket Appeal and File

Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

EQUITY—No. 212.

DUNKLEY COMPANY, Plaintiff-Appellee,  
vs.

SUNLIT FRUIT COMPANY,  
Defendant-Appellant.

**Order Extending Time to and Including January 10,  
1922, to File Record and Docket Cause.**

AND NOW UPON MOTION of Frederick S. Lyon, one of the attorneys for defendant-appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which defendant-appellant shall docket its appeal herein and file the record thereof with the clerk of this court be and the same is hereby enlarged and extended to January 10, 1922.

Dated, San Francisco, California, October 18, 1921.

WM. B. GILBERT,

United States Circuit Judge.

[Endorsed]: No. 3824. Equity No. 212. In the United States Circuit Court of Appeals for the Ninth Circuit. Dunkley Company, Plaintiff-Appellee, vs. Sunlit Fruit Company, Plaintiff-Appellant. Order Extending Time to Docket Appeal and File Record With the Clerk of This Court. Filed Oct. 18, 1921. F. D. Monckton, Clerk. Re-filed Jan. 5, 1922. F. D. Monckton, Clerk.



Exhibit "A."

(Exhibits Attached to Affidavit of Thomas Brazill.)

# KALAMAZOO FOUNDRY & MACHINE CO.

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. Jan. 10, 1911.

to Kalamazoo Foundry & Machine Co.  
 Cash  
 Bills Not as Rendered.

City.

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
					40	0	
1 set of gas chucks	1098			15 1/3		6.00	
1 set of			11 1/2		05	5.91	
							7.15
1 set of hangers	1099			14 1/3		8.60	8.60

0 13 75

131.07

1.324.40

6

54057

1280

535337

ED.

9/11

Exhibit "B."

# KALAMAZOO FOUNDRY & MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 33

KALAMAZOO, MICH.

Sold to Central California Cannery Co.,

TERMS CASH. Foundries,  
ALL BILLS NET AS RENDERED.

DATE,

Date	DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
------	-------------	--------------	------------	--------	-------	-------	--------	-------

One 1/2 inch machine 1033

1 50 1 00

Rolling

498 1/2 17 45

Roll on angle iron 1029

40 50 20 00

Rolling on per

1/2 inch angle iron

711 1 1/2 22 50

①

ML

3 04 1/2

3 68 4 4

5 2 3 1

24 0 0

7 2 7 7

7 2 4 4

POSTED.

① 41

## Exhibit "C."

## KALAMAZOO FOUNDRY &amp; MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. Mar. 9, 1914.

Sold to Dunkley Co.

Sundries,

TERMS CASH.  
ALL BILLS NET AS RENDERED.

City,

DATE	DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
1	Work on gear shields I036				53	50	26 50	26 50
1	Planing bases I044				6	50	3 00	
	Castings			1700		03	2 28	8 28
2	Work on angle iron. I046				3	50	1 50	
	I6. of 4 X 4 X 3/8"							
	Angle iron			1500		03 1/2	5 42	6 92
5	Work on small castings				37	50	18 50	
	Castings			100		3 1/2	4 23	22 73
7	I 7/16" L.R. Sharpling					05	2 55	
	Cutting off						30	2 85

167 28

1447

81 77

FOOTED.

289

1160

951

5717

1240

737

C41



Exhibit "D."

KALAMAZOO FOUNDRY & MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. MAR. 11, 1904.

to Dunkley Co.,  
Supplies,  
CASH.  
BILLS NOT AS RENDERED.

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
Work and material as per ticket attached.						1 80	1 80
Work on wood pulleys 1081			52	50		30 00	30 00
Work on channel iron. 1085							
(Smith & Belser)				1	80	1 80	
Van oil.				1			
Express	7.2.8					90	
Channels	9.4		1134	03		3 30	3 30
Work on steel	1136			1 1/2	50		
Ext. Iron.			105	03		49	49
6 screws as per tickets attached.							67
						9 41	9 41

44 44

39 5 65

POSTED

CH1

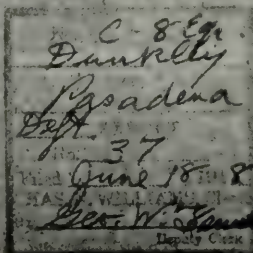


Exhibit "E."

# KALAMAZOO FOUNDRY & MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. Apr. 10, 1911.

Sold to Dunkley Co

Sundries.

TERMS CASH.  
ALL BILLS NET AS RENDERED.

6167.

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
Work on crank irons (Smith & Helper)	1145,			1 1/2	60		
Work on shaft,	934			3 1/2	40	1 35	
1 1/2" 16" C.R. Sharfing		335		03		1 10	
Bearings as per tickets attached.		475		3 1/2		2 35	

2 3

2 3

150

60 37

6587

66

539.06

11471

233

2.65

541.41

117.31

66

POSTED.

CH



## Exhibit "A."

(Attached to Affidavit of Katherine H. Breen.)

Charge to	Particulars	Debit	Credit	Balance
P. G. Address				
Mar				
Vin				
Care				
Wages by				
Subscription				

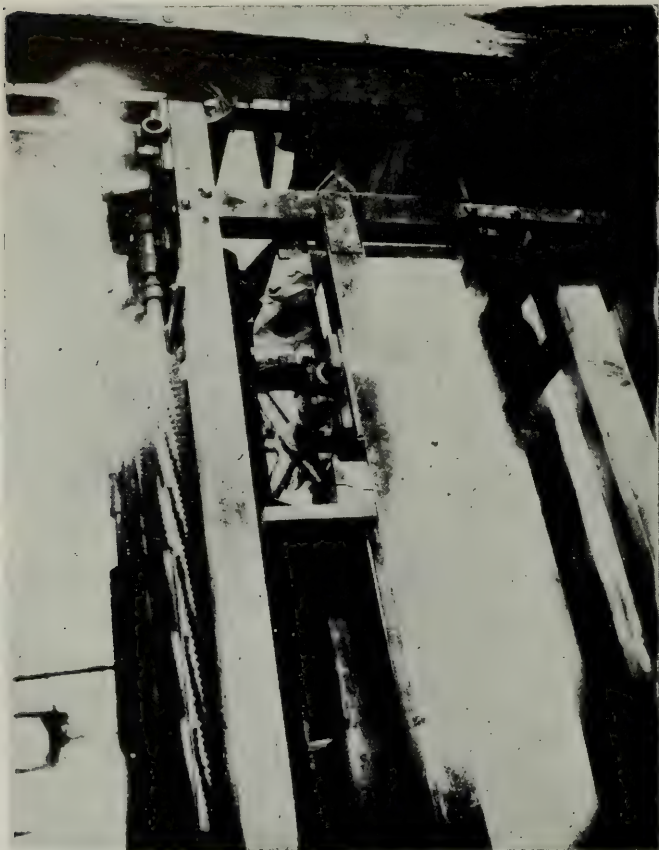


*vs. Dunkley Company.*

1123

**Dunkley's Exhibit No. 2.**

Photograph 1 of Second Machine.



1124 *Central California Canneries Company et al.*

**Dunkley's Exhibit No. 2.**

Photograph 2 of Second Machine.



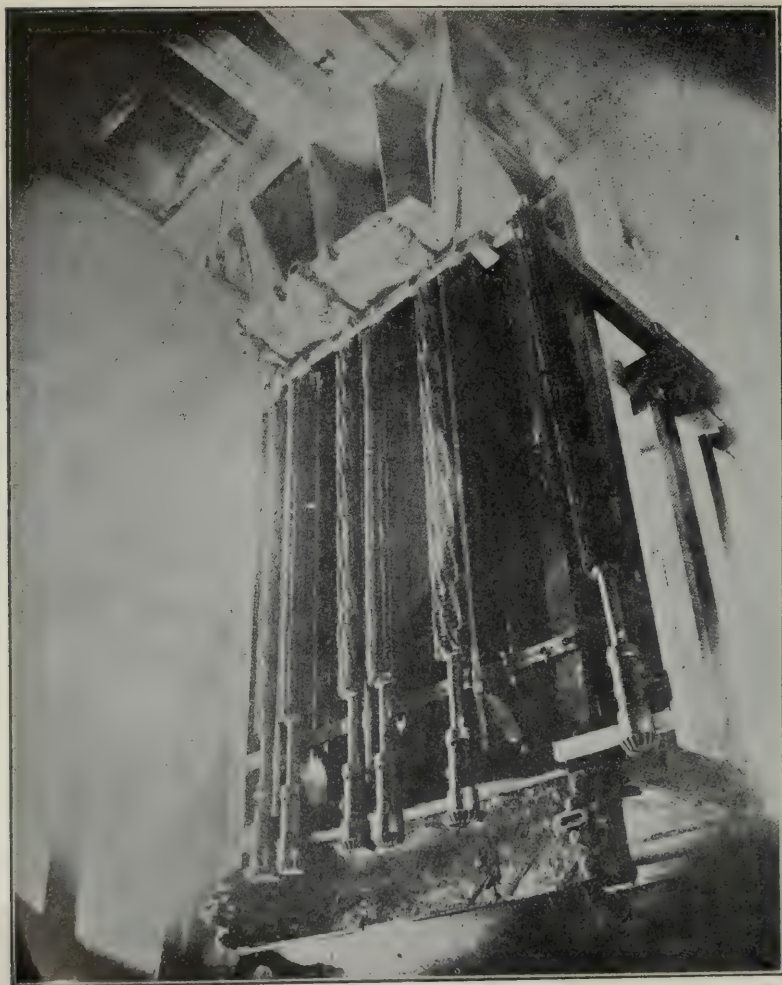


*vs. Dunkley Company.*

1125

**Dunkley's Exhibit No. 2.**

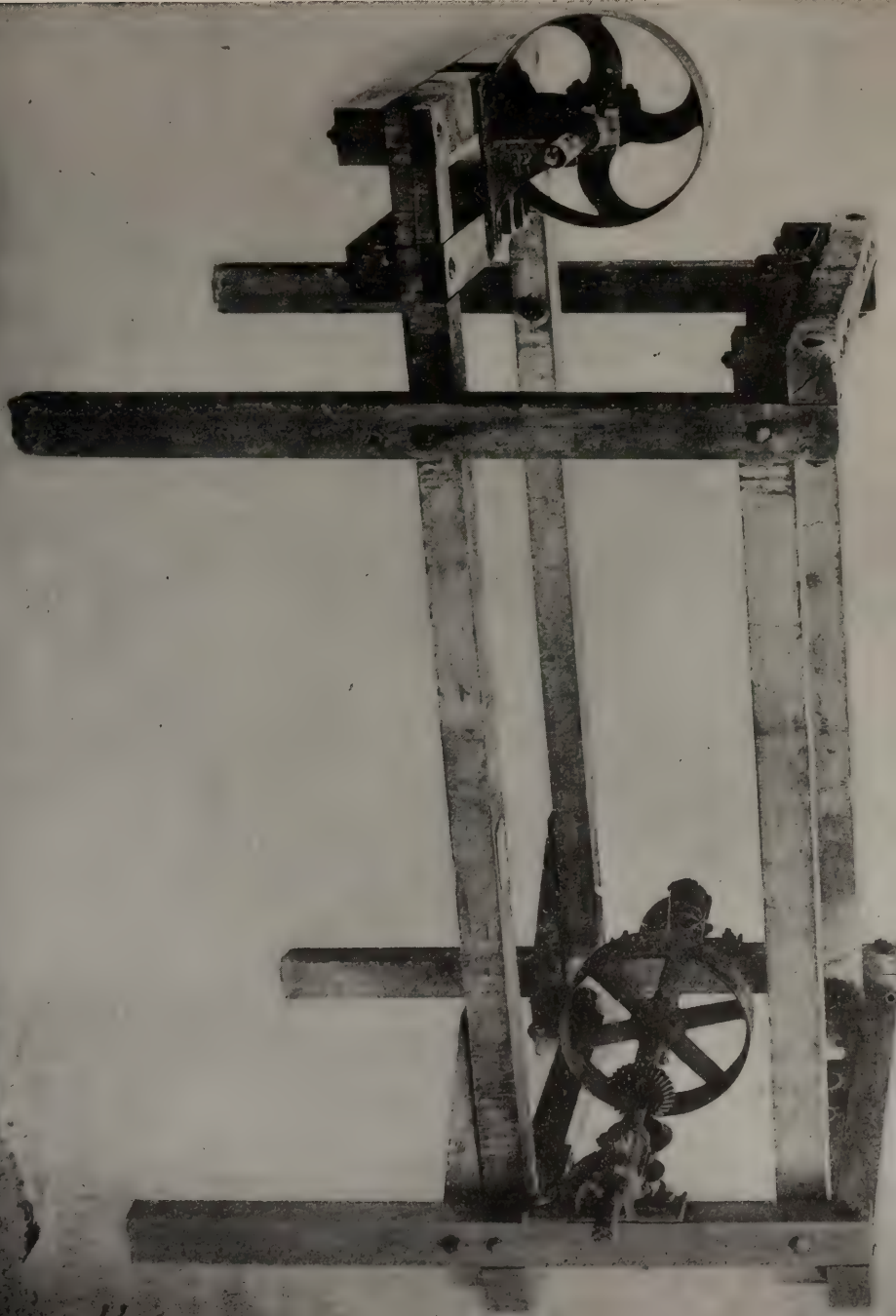
Photograph 3 of Second Machine.



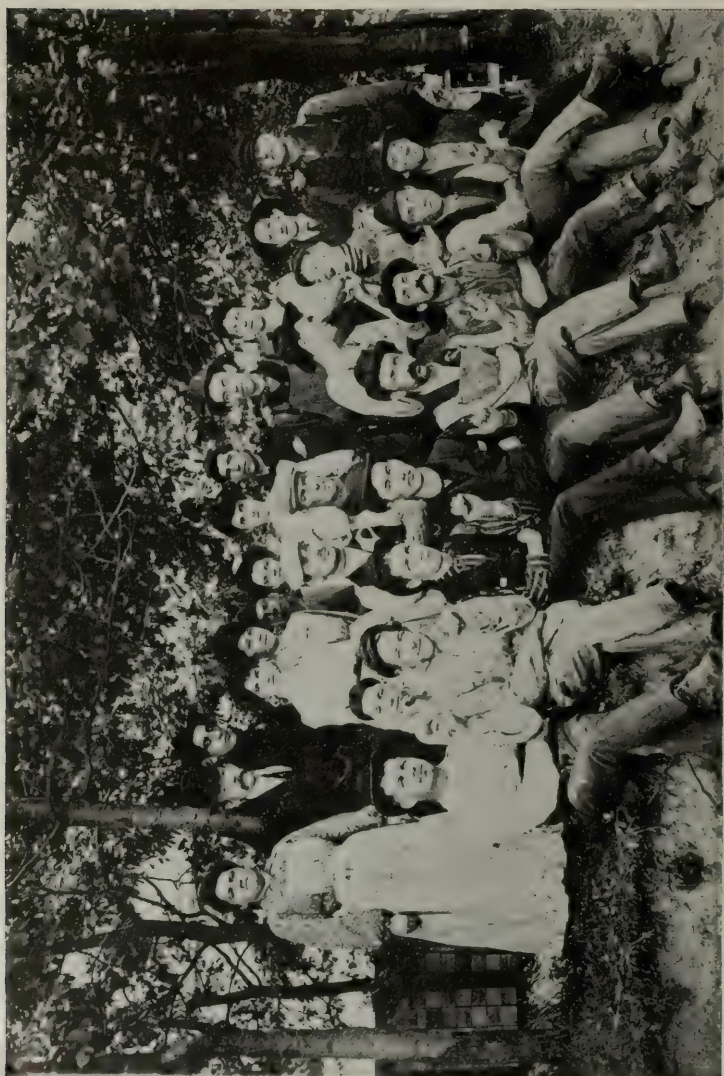


**Exhibit "D."**

(Attached to Supplemental Affidavit of George K.  
Brown.)



**Exhibit "E."**



Mutes Spelling Dunkley Peach.

Exhibit "A."

(Attached to Affidavit of Fred J. Buckley.)

# KALAMAZOO FOUNDRY & MACHINE CO.

COR. CHURCH AND ELEANOR STREETS.

PHONE 35.

KALAMAZOO, MICH. Feb. 20, 1911.

to Kalamazoo Co.

MS CASH.  
BILLS NET AS RENDERED.

City.

DESCRIPTION	Order Number	No. Pairs	Weight	Hours	Price	Amount	Total
					40		
Work on car shocks	1098			15 1/3		6 00	
Rebuilding			315		05	2 05	
							7 10
Work on hangers	1099			14 1/3		6 00	
							8 60

OK

13107

1.324.4  
6

54.57

128.3

55.337

PH



## Exhibit "B."

## KALAMAZOO FOUNDRY &amp; MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 53.

KALAMAZOO, MICH. 1925/04/04

Sold to: The Cannery Co.,

TERMS CASH, 100 days,  
ALL BILLS NET AS RENDERED.

Date:

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
One 10" angle machine 1033				2	50	1 00	
Reelings:			498	3 1/2		17 45	
Work on angle irons 1039				45	50	22 50	
Reelings as per tickets attached,			711	3 1/2		24 50	

3044

36844

11231

24 00

7277

39244

POSTED.

C41

Exhibit "C."

KALAMAZOO FOUNDRY & MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. Mar. 9, 1914.

Sold to Dunkley Co.

Sundries,

TERMS CASH.  
ALL ODDS MET AS RENDERED.

City,

Date	DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
3/1	Work on gear shields	1036			53	50	26 50	26 50
1	Planing bases	1044			6	50	3 00	
	Castings			176#		03	3 28	8 28
2	Work on angle iron.	1046			3	50	1 50	
	16. of 4 X 4 X 3/8"							
	Angle iron			154#		03 1/2	5 42	6 92
		1045						
5	Work on small Castings				37	50	18 50	
	Castings			121#		3 1/2	4 25	22 75
		1074						
7	1 7/16" C.R. Shafting			51#		05	2 55	
	Cutting off						30	3 85
								267 28
								14 47
								81 77

289

1160

951

5777

140

5777

41



## Exhibit "D."

## KALAMAZOO FOUNDRY &amp; MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55.

KALAMAZOO, MICH. JUNE 11, 1904.

Sold to Dunkley Co.,  
 Sundries,  
 TERMS CASH.  
 ALL BILLS NET AS RENDERED.

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
Work and material as per ticket attached.						<u>1 80</u>	1 80
Work on wood pulleys 1081		52	50			<u>27 00</u>	28 00
Work on channel iron. 1085 (Smith & Helper)				5	20	1 00	
Man only,				1		20	
Express						80	
Channels				11 3/4	03	<u>3 31</u>	6 31
Work on stamp				1 1/2	50	75	
Stl. Iron.				14 1/2	03	<u>42</u>	67
3 slings as per tickets attached.						<u>9 41</u>	9 41
							8 44 44

C-8 En.  
 Dunkley  
 Pasadena  
 Dept.  
 37  
 June 18 '04  
 Geo. W. Henry  
 Deputy Cash.

CH/1

Exhibit "E."

# KALAMAZOO FOUNDRY & MACHINE CO.,

COR. CHURCH AND ELEANOR STREETS.

PHONE 55

KALAMAZOO, MICH. Aug. 10, 1911.

Sold to Dunkley Co

Guaranties.

TERMS CASH.  
ALL BILLS NET AS RENDERED.

DESCRIPTION	Order Number	No. Pieces	Weight	Hours	Price	Amount	Total
Work on track irons							
(Smith & Helper)	1145,			1 1/2	80		20
Work on shaft,	934			2 1/2	70	2 75	
1 5/16" C.R. Chaffing			335		05	1 10	
							2 35
Castings as per							
tickets attached.			475	3 1/2		2 75	

2 75  
15 00

60 3 77  
6 5 2 77  
66

539.06 11471  
2 33 2 25  
541.41 117.31

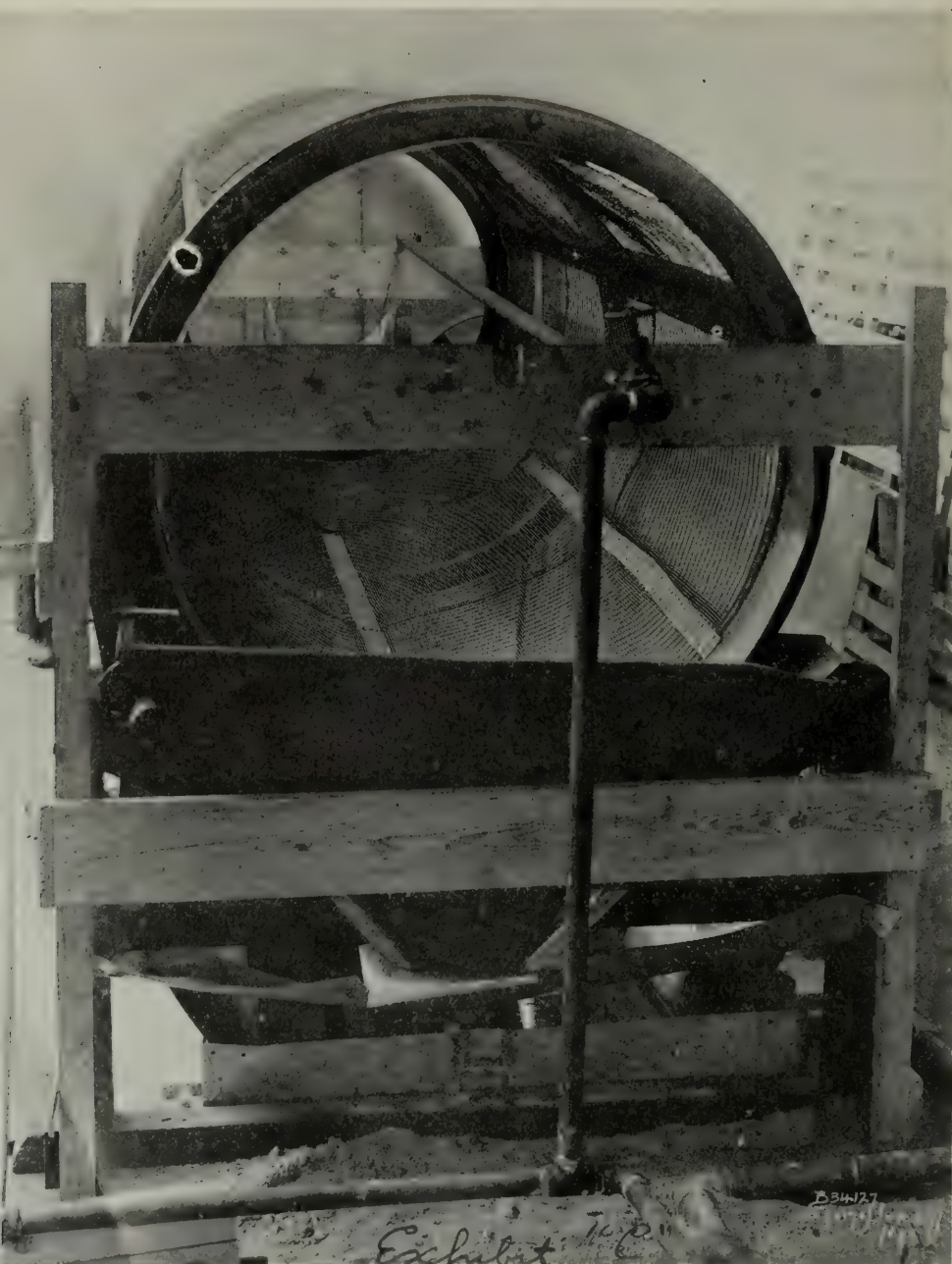
66

POSTED

CH

**Exhibit "C."**

(Attached to Affidavit of Kemper B. Campbell.)



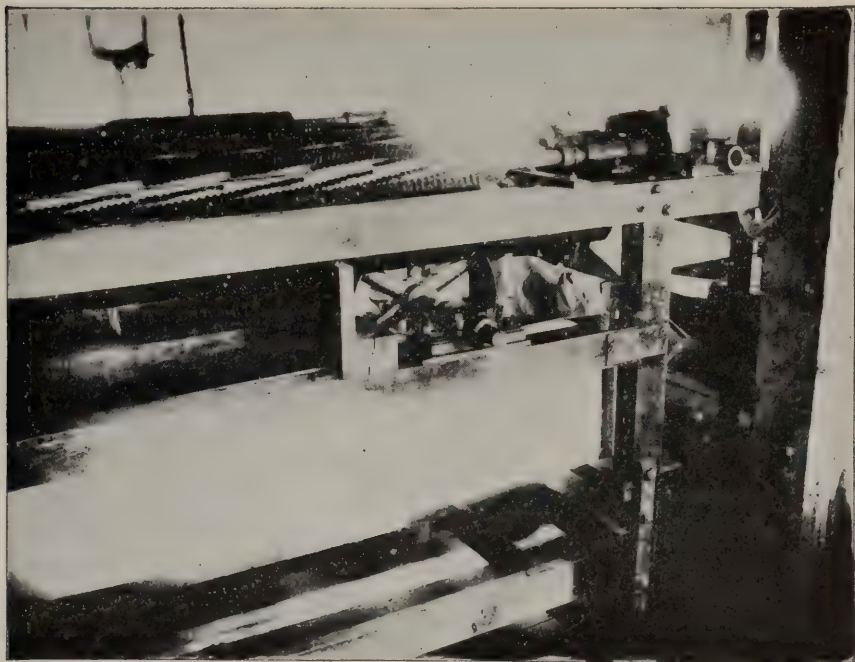
(Attached to Affidavit of Stewart Campbell.)

**Exhibit "A."**

128

476

"Dunkley's Exhibit No. 2, Photograph 1 of Second Machine."



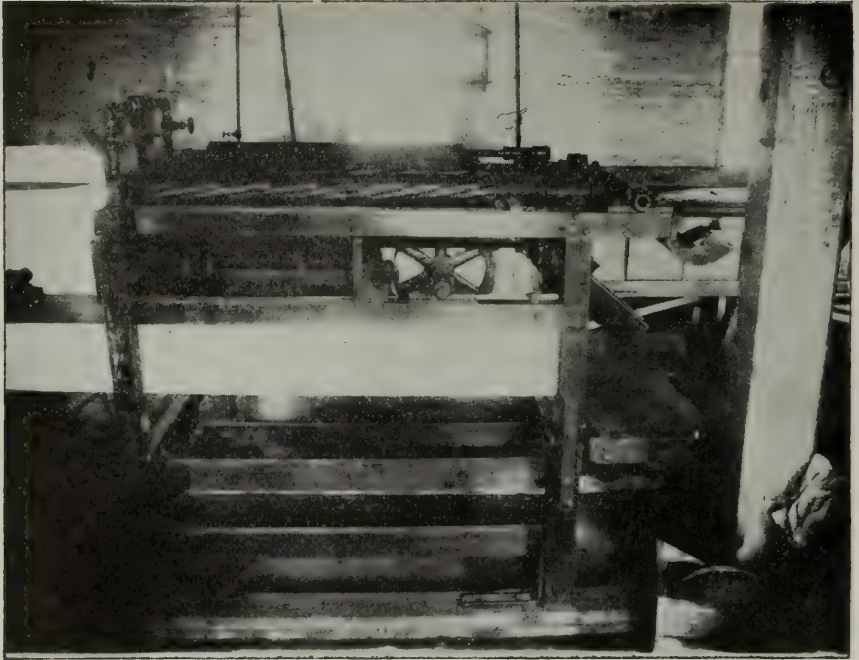


**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."



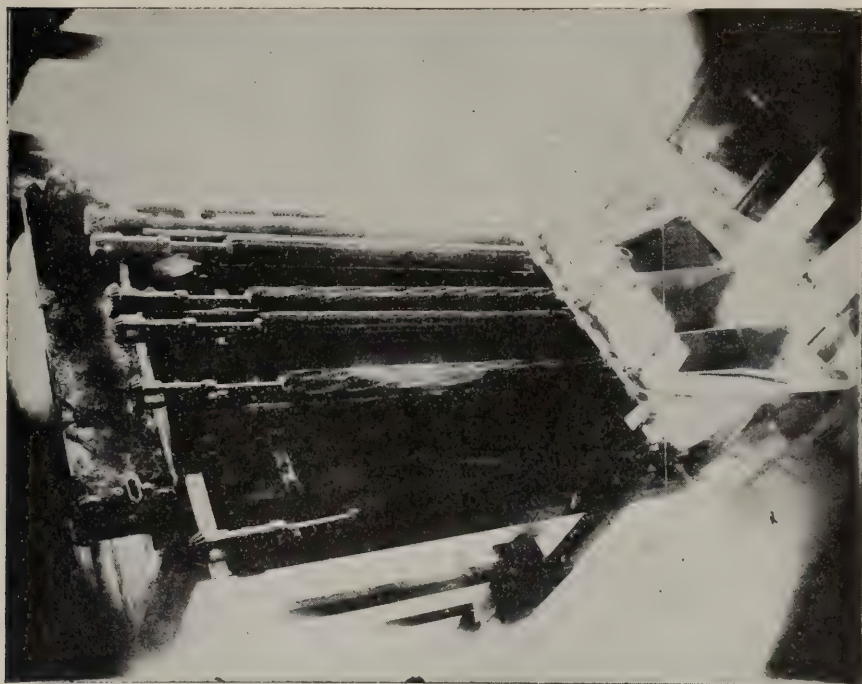


**Exhibit "C."**

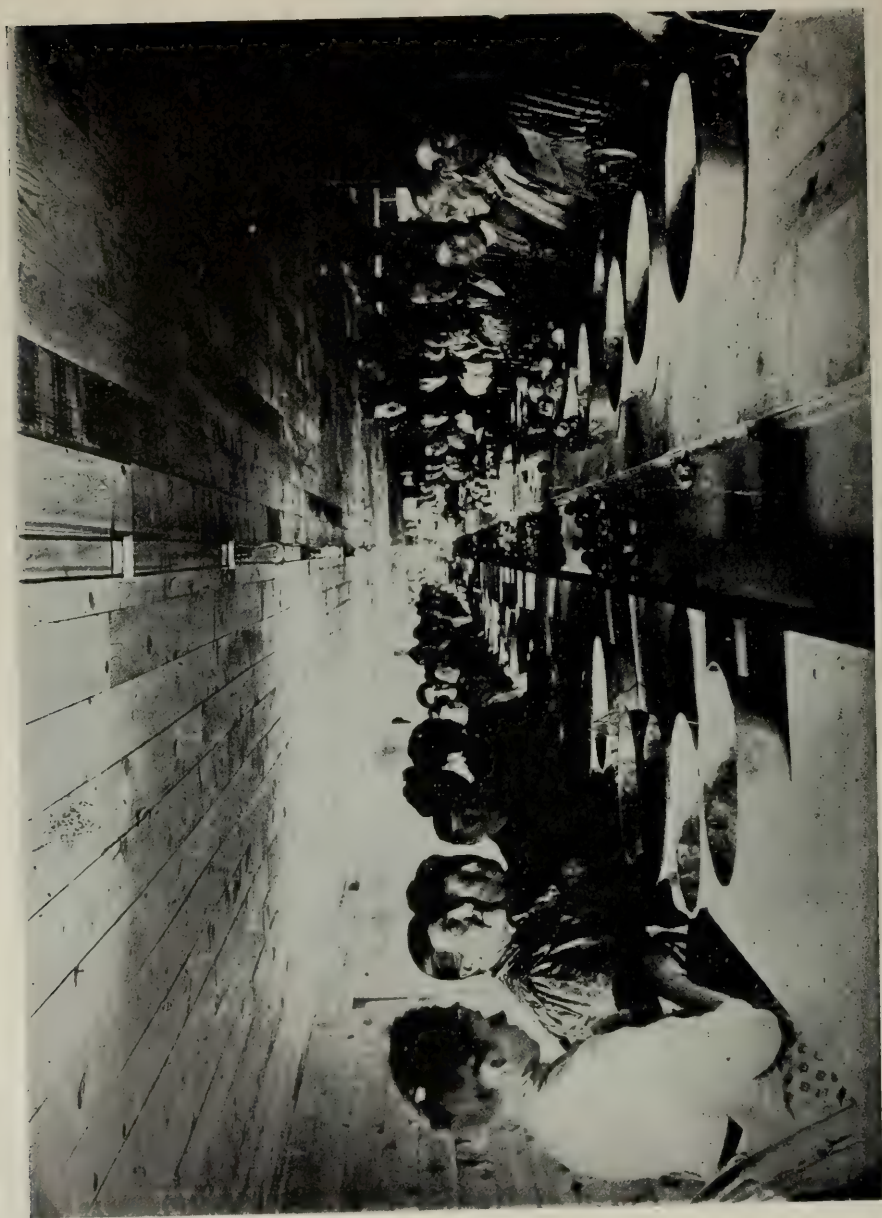
130

478

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."



**Exhibit "D."**



**Exhibit "E."**



*Filling Table*









(First Affidavit.)

17

NY  
e



100  $\mu$ m



a

5



1

NEWSPAPER CLIPPING.

(Attached to Second Affidavit of L. Crosthwaite.)

THE TRIBUNE-MESSINGER.

No. 8

SOUTH HAVEN, MICHIGAN, FRIDAY, APRIL 22, 1904

Price Two Cents

FORM DAMAGE

SNOW STORM

GOLDEN WEDDING

SURPRISE FOR

LIFE SENTENCE

NEWS FROM THE

AT ST. JOSEPH

AT CHARLEVOIX

AT MEADOWBROOK

BOAT OWNERS

FOR ROESKI

COUNTY COURTS

Form Damage. The form damage was reported by the St. Joseph County courts. The damage was caused by the snow storm which hit the area on Friday night. The damage was estimated at \$1000. The courts are now trying to determine who is responsible for the damage.

Golden Wedding. The golden wedding of Mr. and Mrs. John Smith was celebrated on Friday night. The celebration was held at the St. Joseph County courts. The celebration was attended by many guests. The celebration was a very successful one.

Life Sentence. The life sentence was given to the man who was convicted of the crime. The sentence was given by the St. Joseph County courts. The sentence was a very severe one. The man was found guilty of the crime.

News from the County Courts. The news from the county courts was reported by the St. Joseph County courts. The news was that the courts were busy with cases. The courts were trying to determine who is responsible for the damage.

His Automobile Was Too Quick. The man who was driving the automobile was too quick. The man was driving the automobile at a high speed. The man was driving the automobile on a road that was very narrow. The man was driving the automobile in a very dangerous manner.

Annual Convention of the Epworth League. The annual convention of the Epworth League was held on Friday night. The convention was held at the St. Joseph County courts. The convention was attended by many guests. The convention was a very successful one.

Large Attendance at Scott Club. The large attendance at the Scott Club was reported by the St. Joseph County courts. The attendance was very high. The club was very popular. The club was a very successful one.

Improvements to Canning Factory. The improvements to the canning factory were reported by the St. Joseph County courts. The improvements were very good. The factory was very successful. The factory was a very successful one.

Improvements to Canning Factory. The improvements to the canning factory were reported by the St. Joseph County courts. The improvements were very good. The factory was very successful. The factory was a very successful one.

Funeral Services of F. F. Dickinson. The funeral services of F. F. Dickinson were held on Friday night. The services were held at the St. Joseph County courts. The services were attended by many guests. The services were a very successful one.

Funeral Services of F. F. Dickinson. The funeral services of F. F. Dickinson were held on Friday night. The services were held at the St. Joseph County courts. The services were attended by many guests. The services were a very successful one.

Funeral Services of F. F. Dickinson. The funeral services of F. F. Dickinson were held on Friday night. The services were held at the St. Joseph County courts. The services were attended by many guests. The services were a very successful one.

Lots of Trouble at the Ocean Wave. The lots of trouble at the Ocean Wave were reported by the St. Joseph County courts. The trouble was very bad. The Ocean Wave was very successful. The Ocean Wave was a very successful one.

Lots of Trouble at the Ocean Wave. The lots of trouble at the Ocean Wave were reported by the St. Joseph County courts. The trouble was very bad. The Ocean Wave was very successful. The Ocean Wave was a very successful one.

Lots of Trouble at the Ocean Wave. The lots of trouble at the Ocean Wave were reported by the St. Joseph County courts. The trouble was very bad. The Ocean Wave was very successful. The Ocean Wave was a very successful one.

Lots of Trouble at the Ocean Wave. The lots of trouble at the Ocean Wave were reported by the St. Joseph County courts. The trouble was very bad. The Ocean Wave was very successful. The Ocean Wave was a very successful one.

Dunkley Warehouse Ready to Move. The Dunkley Warehouse was ready to move. The warehouse was very successful. The warehouse was a very successful one.

Dunkley Warehouse Ready to Move. The Dunkley Warehouse was ready to move. The warehouse was very successful. The warehouse was a very successful one.

Dunkley Warehouse Ready to Move. The Dunkley Warehouse was ready to move. The warehouse was very successful. The warehouse was a very successful one.

Dunkley Warehouse Ready to Move. The Dunkley Warehouse was ready to move. The warehouse was very successful. The warehouse was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.

Party in Honor of South Haven Girl. The party in honor of the South Haven girl was held on Friday night. The party was held at the St. Joseph County courts. The party was attended by many guests. The party was a very successful one.



THE TRIBUNE-MESSENGER

SOUTH HAVEN, MICHIGAN FRIDAY, JUNE 17, 1904

# STEAMER BURNED 500 PERISHED

Special Telegram to The Tribune children plunged overboard by New York June 16.—The

Steamship General Slocum, with a Sunday school excursion from St. Mary's German Lutheran Church, caught fire in the East.

Over 1000 persons were on board, mostly women and children. The boat was beached on North Brother Island, but it will be hours before the fire in the hold is out, flames

500 perished, including the pastor of the church, Rev. Geo. C. F. Haas, and his entire family.

—  
LATER NEWS.

and the bodies can be recovered. The name of the pastor is Rev. Geo. C. F. Haas, who escaped. Capt. Wm. VanSchaick, who commanded the Stearns, was arrested.

# MALE CHORUS

**FRIDAY EVENING**

The concert which will be given by the vocal choros Friday evening at the opera house will consist of the following:

**COUNTY COURTS**

Special Correspondence to The Tribune  
**PROBATE NEWS.**  
Estate of Lemuel D. Emerson; final

will be an occasion unique in South Hawaii, musical circles. The grand harmony produced by thirty male voices, which have been especially trained for harmonic effect, is claim day.	Est. of Jane M. Cole; singing. Hearing July 11. Est. of Kate A. Calvin; last claim day.
---	--

some one that must be heard to be appreciated. Several choruses will be rendered, which will exhibit several degrees of shading, from the softest lullaby to the loud battle cry in addition	Est. of Horace Logan; hearing on final account.
	Est. of E. M. Prestou; same.
	Est. of Oliva M. Gennip; same.
	Est. of Michael Cairp; same.

to which a variety of comic songs  
by the full chorus will add spice to

Mrs. E. S. Linderman is con-  
nued to her ed with what was  
thought to be typhoid fever but has

been found to be a less dangerous disease.

The male chorus concert will be given Friday night June 17 and will be a rare treat in every respect.

Every one who enjoys male voice music, and who does not, should be present.

two or three days, after  
will go to Albion to attend the  
Commencement at which occurs this  
week.

the Gallagher Pickle Company will begin at once the erection of a building similar to the one recently sold in South Haven. The building will be 36x150 feet and 2 1/2 stories high with a capacity of 800

The company has contracted for 300 acres of cucumbers and will pay the same price that is being paid here, \$1.20 per cwt. \*

**LEGAL NOTICES.**

...an in.

Stop and  
get his  
is there

to, June 15.—The entrance to the harbor of Port Arthur has been cleared of obstructions, and open for the passage of ships.

Mrs. E. S. Linderman is con-  
nued to her ed with what was  
thought to be typhoid fever but has

been found to be a less dangerous disease.

The male chorus concert will be given Friday night June 17 and will be a rare treat in every respect.

Every one who enjoys male voice music, and who does not, should be present.

two or three days, after  
will go to Albion to attend the  
Commencement at which occurs this  
week.

the Gallagher Pickle Company will begin at once the erection of a building similar to the one recently sold in South Haven. The building will be 36x150 feet and 2 1/2 stories high with a capacity of 800

The company has contracted for 300 acres of cucumbers and will pay the same price that is being paid here, \$1.20 per cwt. \*

**LEGAL NOTICES.**

...an in.

Stop and  
get his  
is there

to, June 15.—The entrance to the harbor of Port Arthur has been cleared of obstructions, and open for the passage of ships.

Exhibit "A."

(Attached to Affidavit of Clyde M. Funk.)

Adams & Hart									
May	17	To	Wages	12.50	June	21	By	Ch	
18					22				
19					23				
20					24				
21					25				
22					26				
23					27				
24					28				
25					29				
26					30				
27					1				
28					2				
29					3				
30					4				
31					5				
1					6				
2					7				
3					8				
4					9				
5					10				
6					11				
7					12				
8					13				
9					14				
10					15				
11					16				
12					17				
13					18				
14					19				
15					20				
16					21				
17					22				
18					23				
19					24				
20					25				
21					26				
22					27				
23					28				
24					29				
25					30				
26					1				
27					2				
28					3				
29					4				
30					5				
31					6				
1					7				
2					8				
3					9				
4					10				
5					11				
6					12				
7					13				
8					14				
9					15				
10					16				
11					17				
12					18				
13					19				
14					20				
15					21				
16					22				
17					23				
18					24				
19					25				
20					26				
21					27				
22					28				
23					29				
24					30				
25					1				
26					2				
27					3				
28					4				
29					5				
30					6				
31					7				
1					8				
2					9				
3					10				
4					11				
5					12				
6					13				
7					14				
8					15				
9					16				
10					17				
11					18				
12					19				
13					20				
14					21				
15					22				
16					23				
17					24				
18					25				
19					26				
20					27				
21					28				
22					29				
23					30				
24					1				
25					2				
26					3				
27					4				
28					5				
29					6				
30					7				
31					8				
1					9				
2					10				
3					11				
4					12				
5					13				
6					14				
7					15				
8					16				
9					17				
10					18				
11					19				
12					20				
13					21				
14					22				
15					23				
16					24				
17					25				
18					26				
19					27				
20					28				
21					29				
22					30				
23					1				
24					2				
25					3				
26					4				
27					5				
28					6				
29					7				
30					8				
31					9				
1					10				
2					11				
3					12				
4					13				
5					14				
6					15				
7					16				
8					17				
9					18				
10					19				
11					20				
12					21				
13					22				
14					23				
15					24				
16					25				
17					26				
18					27				
19					28				
20					29				
21					30				
22					1				
23					2				
24					3				
25					4				
26					5				
27					6				
28					7				
29					8				
30					9				
31					10				
1					11				
2					12				
3					13				
4					14				
5					15				
6					16				
7					17				
8					18				
9					19				
10					20				
11					21				
12					22				
13					23				
14					24				
15					25				
16					26				
17					27				
18					28				
19					29				
20					30				
21					1				
22					2				
23					3				
24					4				
25					5				
26					6				
27					7				
28					8				
29					9				
30					10				
31					11				
1					12				
2					13				
3					14				
4					15				
5					16				
6					17				
7					18				
8					19				
9					20				
10					21				
11					22				
12					23				
13					24				
14					25				
15					26				
16					27				
17					28				
18					29				
19					30				
20					1				
21					2				
22					3				
23					4				
24					5				
25					6				
26					7				
27					8				
28					9				
29					10				
30					11				
31					12				
1					13				
2					14				
3					15				



Exhibit "B."

192

Phelps & McGuire

Oct.

Oct 31 1904

1905

Quintley Co

La Harpe Mich

Cash & Outgoing		Bills		Bills	
Dec 31 1904	100	24607	Dec	24	1904
1905		1705			
Jan 1	100	1705	Jan	27	1904
Mar 1	100	1705	Mar	1	
Apr 1	100	1705	Apr	1	
May 1	100	1705	May	1	
June 1	100	1705	June	1	
July 1	100	1705	July	1	
Aug 1	100	1705	Aug	1	
Sept 1	100	1705	Sept	1	
Oct 1	100	1705	Oct	1	
Nov 1	100	1705	Nov	1	
Dec 1	100	1705	Dec	1	
1905					
Jan 1	100	1705	Jan	1	
Feb 1	100	1705	Feb	1	
Mar 1	100	1705	Mar	1	
Apr 1	100	1705	Apr	1	
May 1	100	1705	May	1	
June 1	100	1705	June	1	
July 1	100	1705	July	1	
Aug 1	100	1705	Aug	1	
Sept 1	100	1705	Sept	1	
Oct 1	100	1705	Oct	1	
Nov 1	100	1705	Nov	1	
Dec 1	100	1705	Dec	1	

Feb 1905



Exhibit "C."

Clark Engine & Boiler Co. 1000 10th St. St. Louis, Mo.		DATE ORDERED 11-1-11		DATE SHIPPED 11-1-11	
ORDER NO. 11-1-11		QUANTITY ORDERED 11-1-11		PRICE 11-1-11	
TO Mr.		SHIPPED BY 11-1-11		PACKED BY 11-1-11	
P.O. Address 11-1-11		CITY 11-1-11		STATE 11-1-11	
NAME 11-1-11		TITLE 11-1-11		POSITION 11-1-11	
VIA 11-1-11		CARRIER 11-1-11		RATE 11-1-11	
SPECIAL INSTRUCTIONS 11-1-11		REMARKS 11-1-11		TOTAL 11-1-11	

695

331

AUG. 30, 1903.

W. B. Dinkley Co.,

City.

Cash

Steel	3 1/2	\$12.50
1/2" x 3/4" x 2" stock with nuts	7	85
1/2" rubber packing	100 lb.	2.87
1/2" steel bolts	15	1.40
10 hours work	100 hr.	70
		6.00
		2.00
		6.50
		4.00

✓

W. B. Dinkley Co.,  
 1000 Market Street, San Francisco, Cal.  
 To the Honorable Board of Directors of the Central California Canneries Company  
 I hereby certify that the above is a true and correct copy of the account of the  
 work done by the above named company during the month of August, 1903.

462

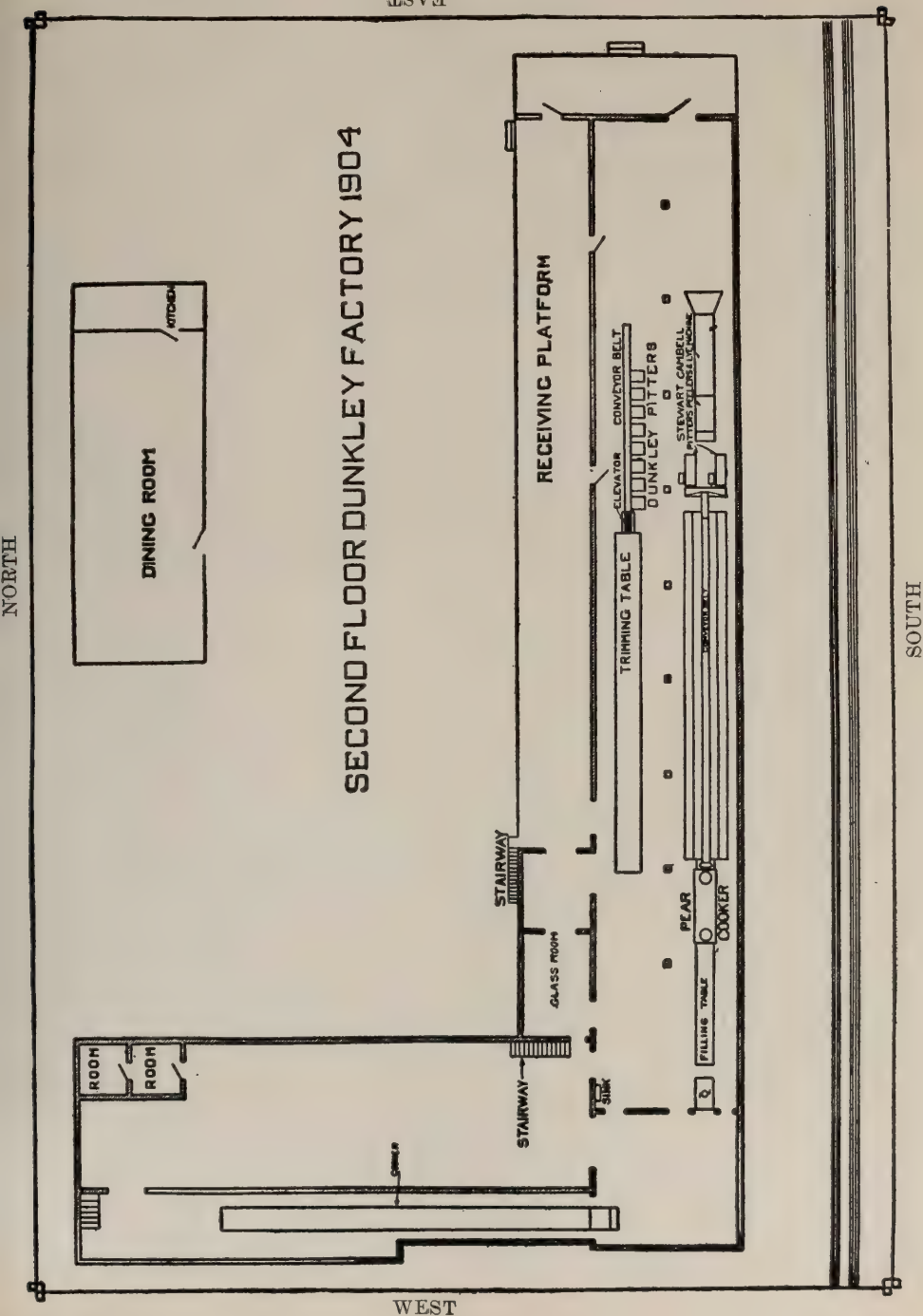
101

Cash

✓

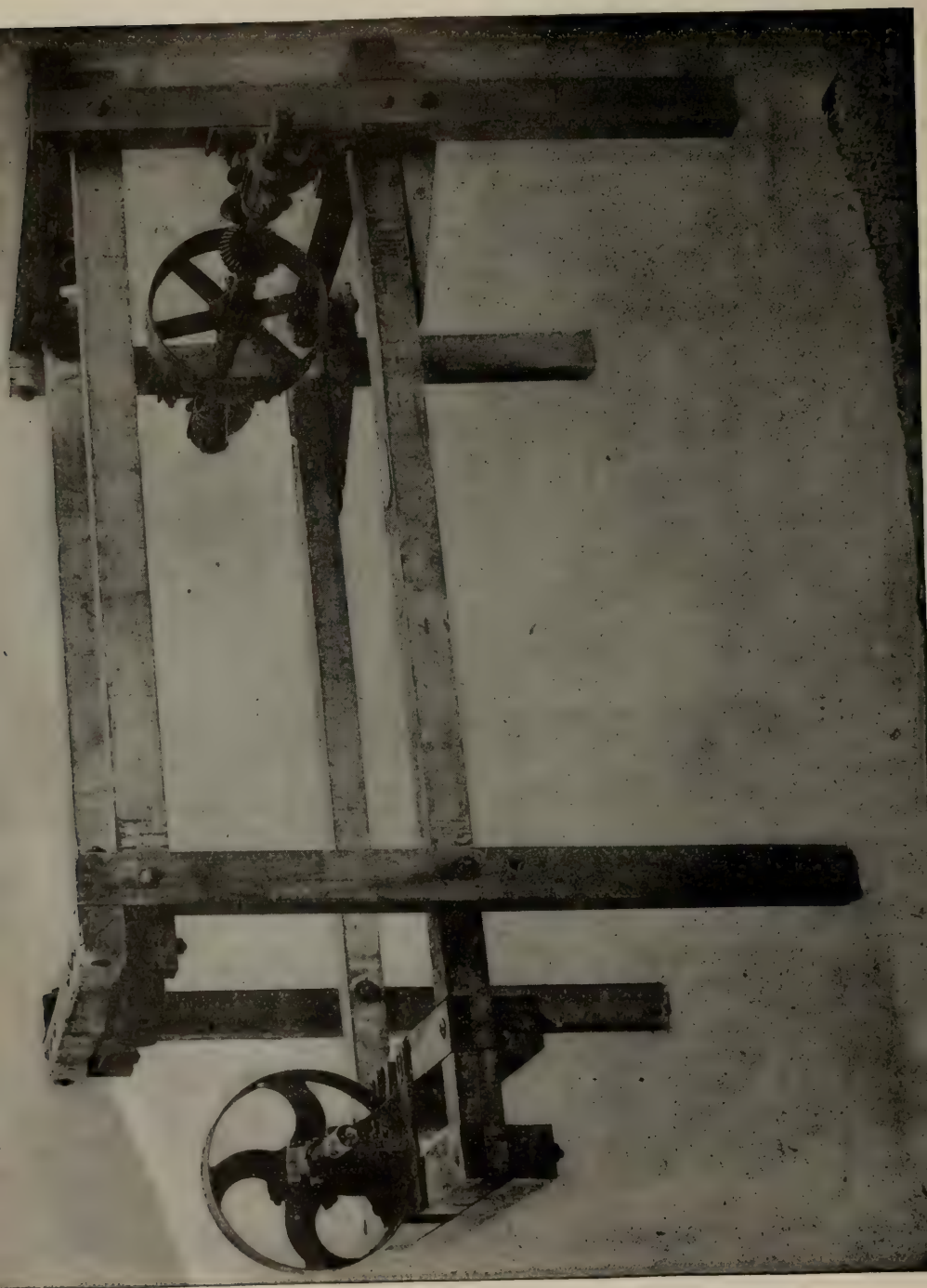
## Exhibit I.

(Attached to Affidavit of William A. Geiger.)





**Exhibit II.**

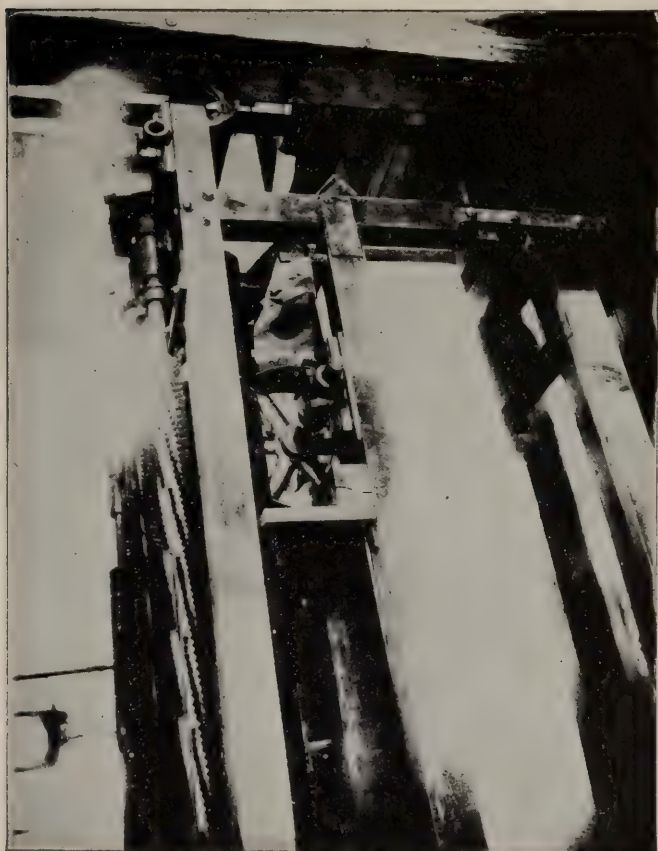


**Exhibit III.**

*vs. Dunkley Company.*

1123

“Dunkley’s Exhibit No. 2, Photograph 1 of Second Machine.”





**Exhibit IV.**

1124 *Central California Canneries Company et al.*

“Dunkley’s Exhibit No. 2, Photograph 2 of Second Machine.”



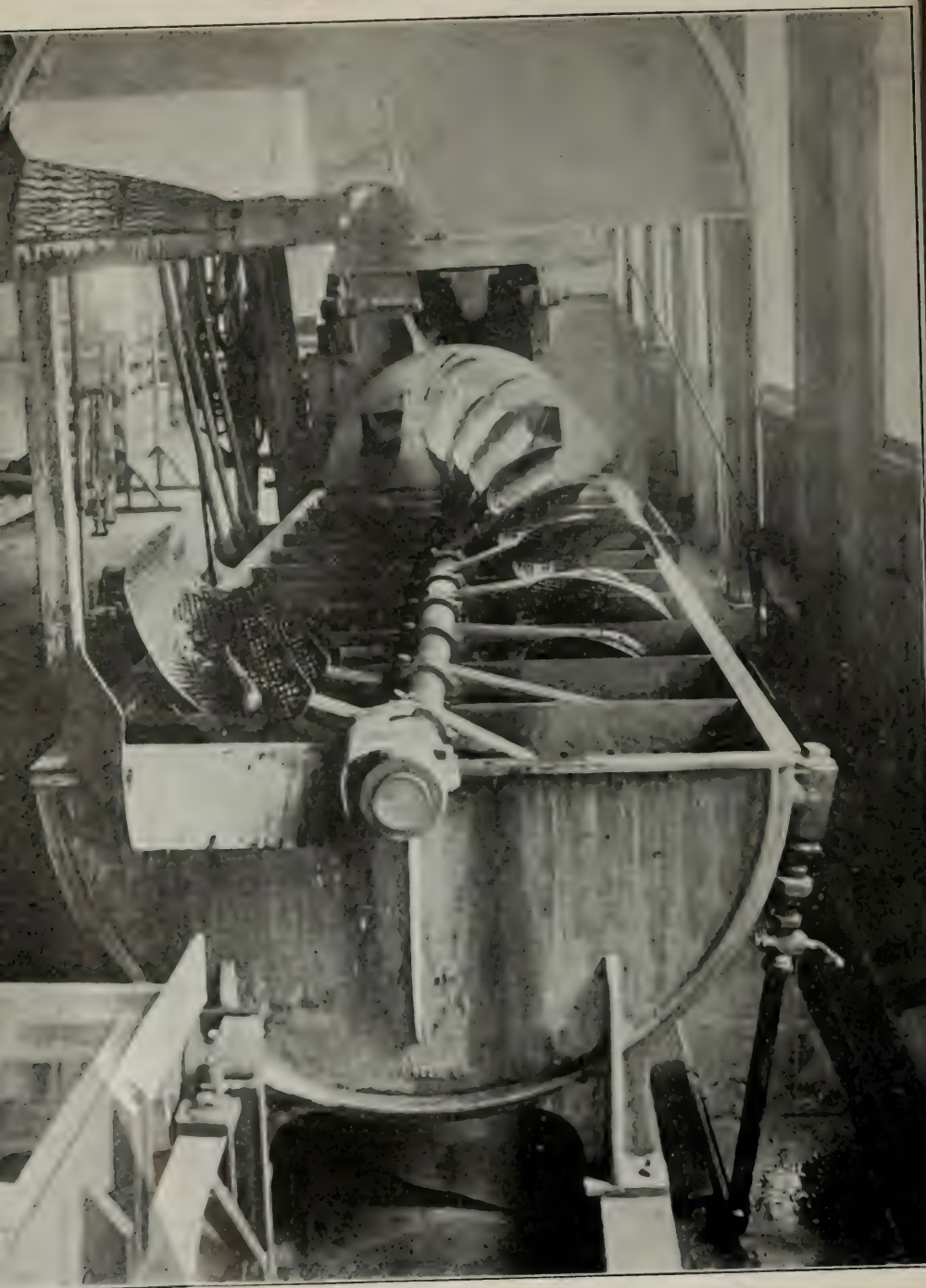
“Dunkley’s Exhibit No. 2, Photograph 3 of Second Machine.”



**Plaintiff's Exhibit No. 5.**

(Attached to Affidavit of G. E. Grier.)

Pasadena Washer, Ptf's Exhibit 5, Dunkley vs.  
Pasadena Canning Co.





**Defendant's Exhibit No. 16.**



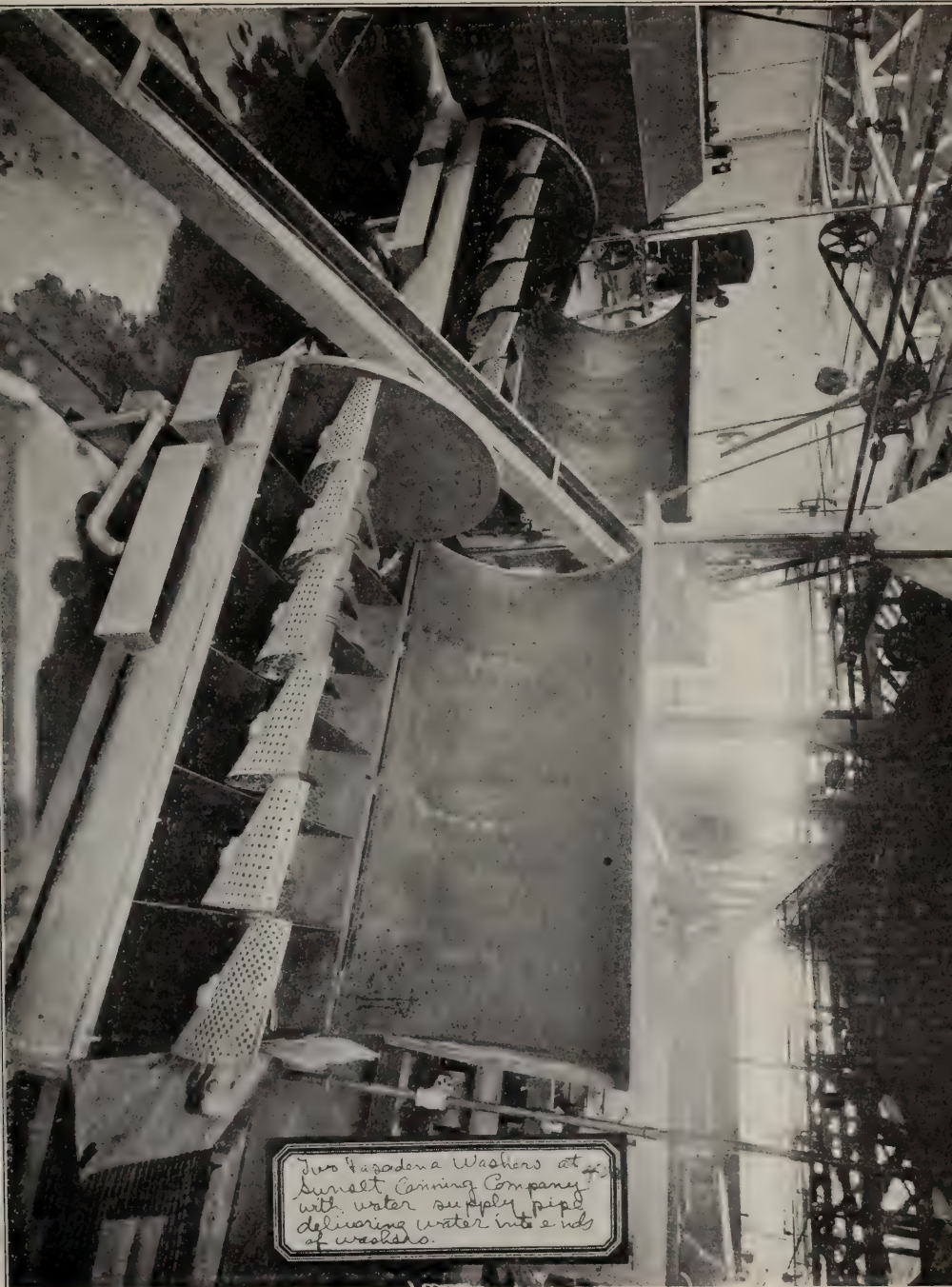
[On reverse side:] Pomona. #3 Pomona Valley Canning Company showing Pasadena Washers and Water supply pipe lines showing one supplied with water from the bottom of washer.—W. F. H.

(Defendant's Ex. No. 16.)

Mr. Boyd Hocker, Supt.



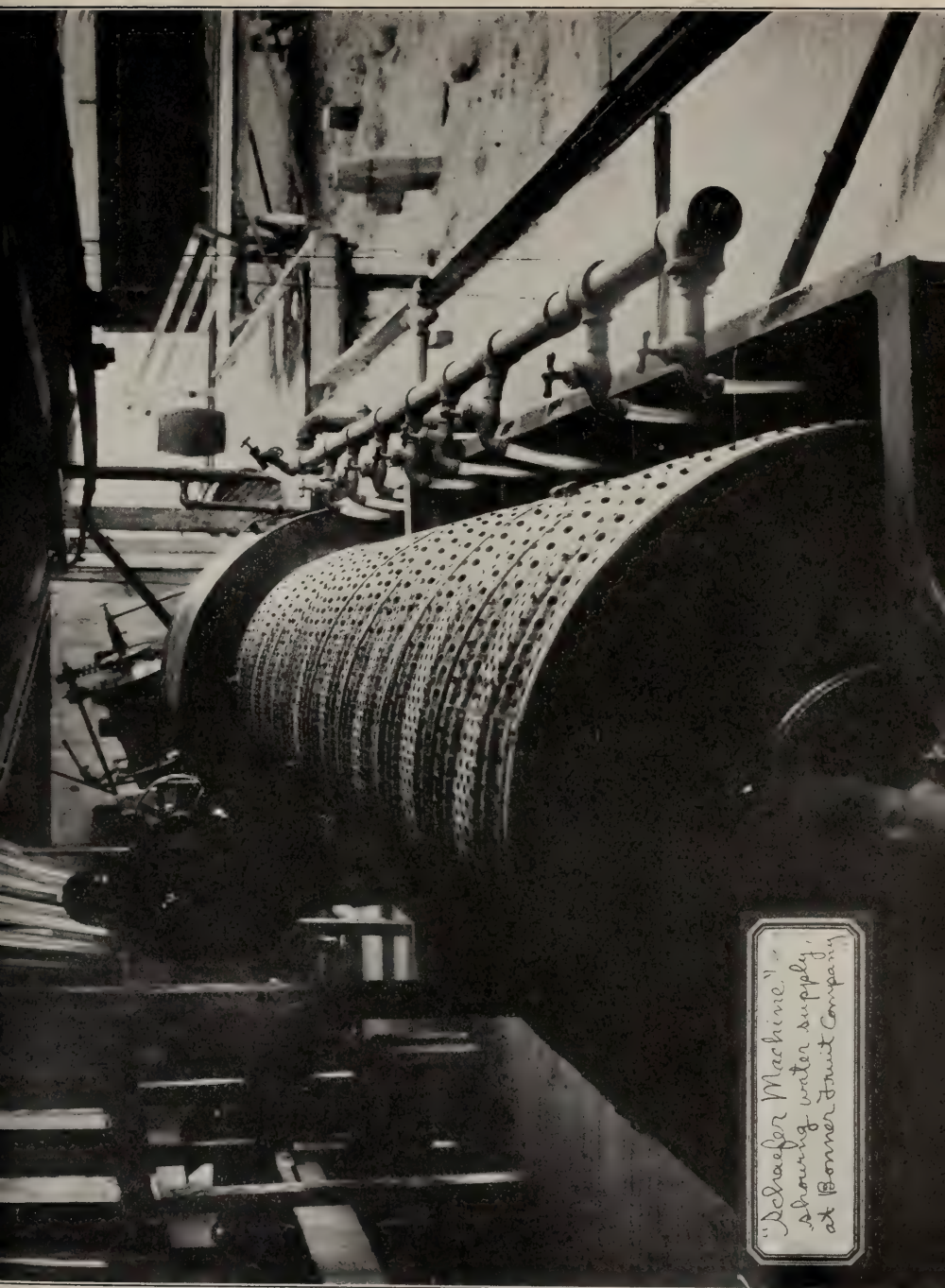
**Defendant's Exhibit No. 15.**



[On reverse side:] Pomona. #2 Sunset Canning Company showing two Pasadena Washers water supply pipes delivering water into ends of Washers.—W. F. H.

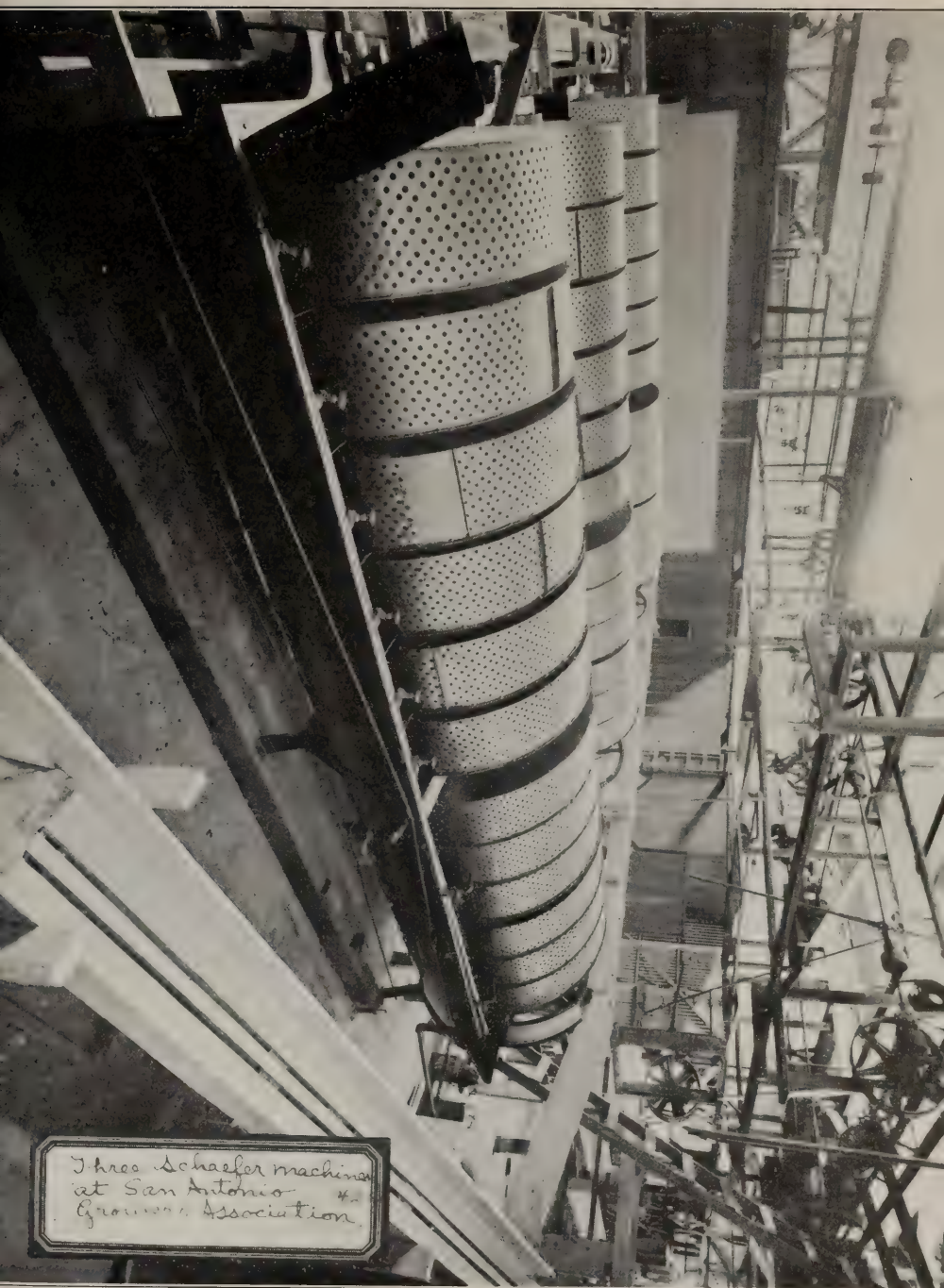
R. E. Page, Supt. saw exposures made.

(Defendant's Ex. No. 15.)



[On reverse side:] LANKERSHIM. #13  
Bonner Fruit Co.—Shows water running into  
Scheafer washers separate compartments.—  
W. F. H.

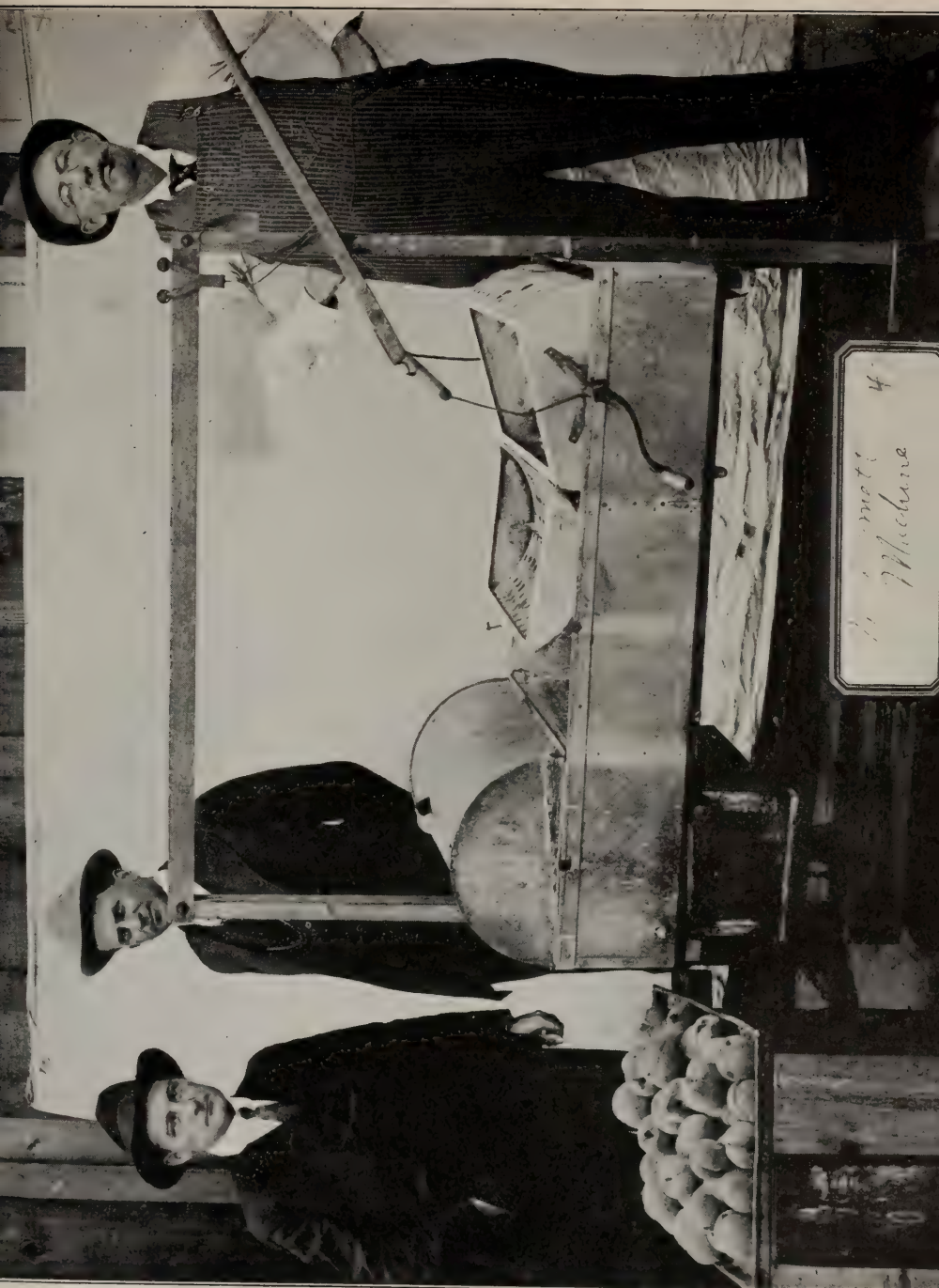






[On reverse side:] Ontario. #7 San Antonio Growers Assn.—Showing three Scheafer washers with water supply line to one washer.—W. F. H.

Mr. Holmes, Supt. saw exposures made.

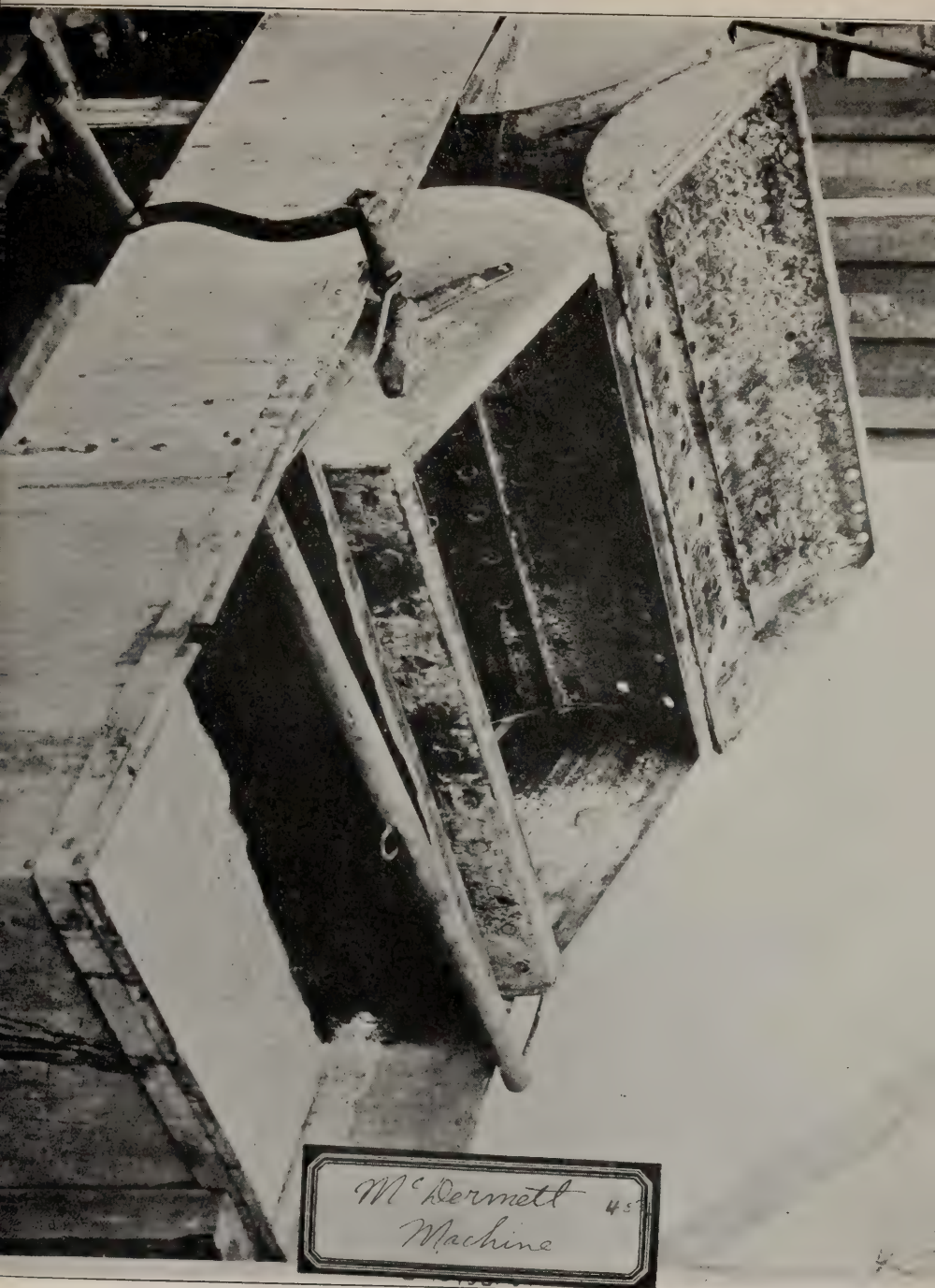


[On reverse side:] #1 EXHIBIT #43.  
TEXAS MACHINE (McDERMETT MA-



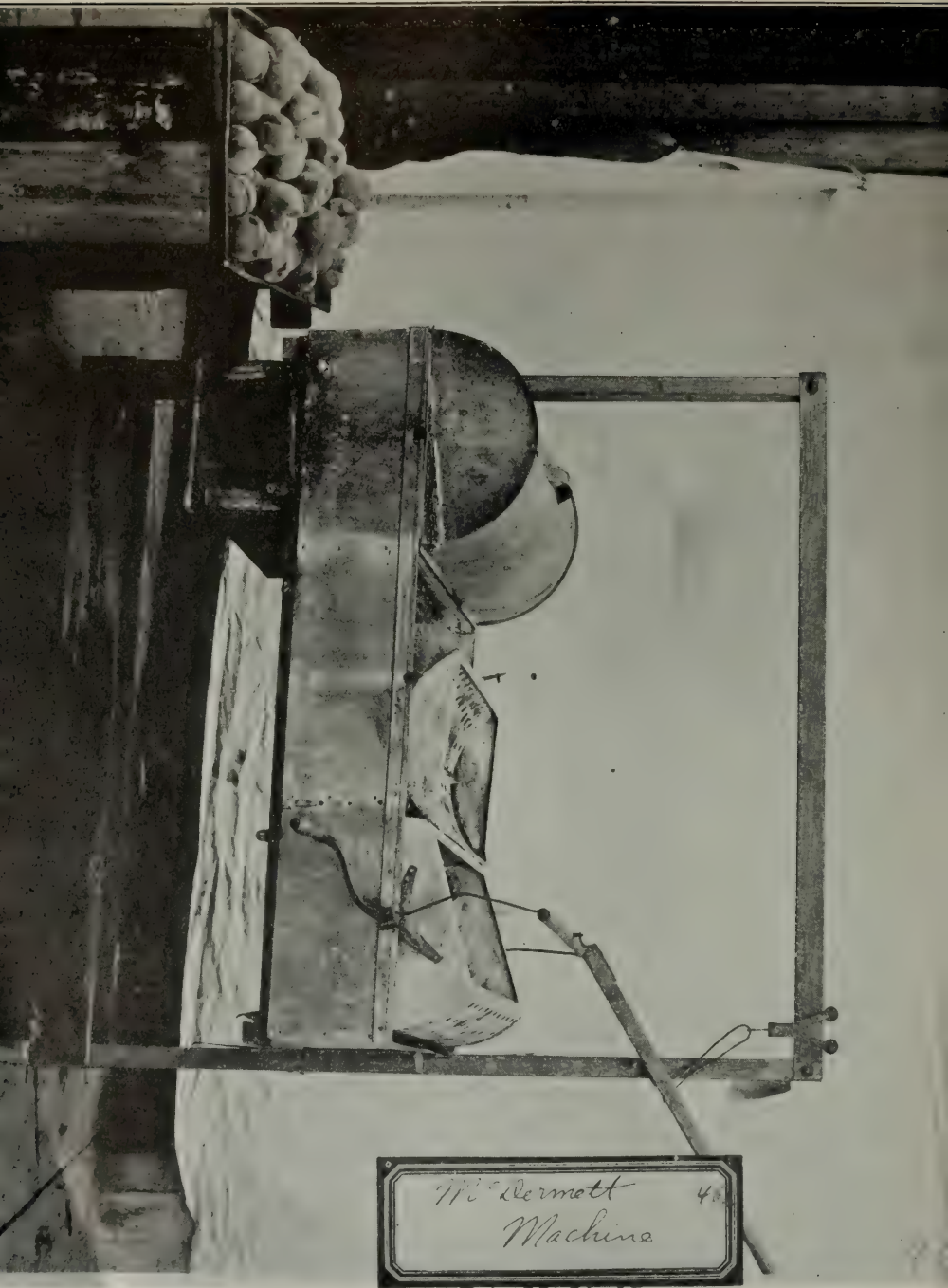
[On reverse side:] #2 EXHIBIT #43.  
TEXAS MACHINE (McDERMETT MA-





[On reverse side:] #3 EXHIBIT #43.  
TEXAS MACHINE (M. DERMOTT)

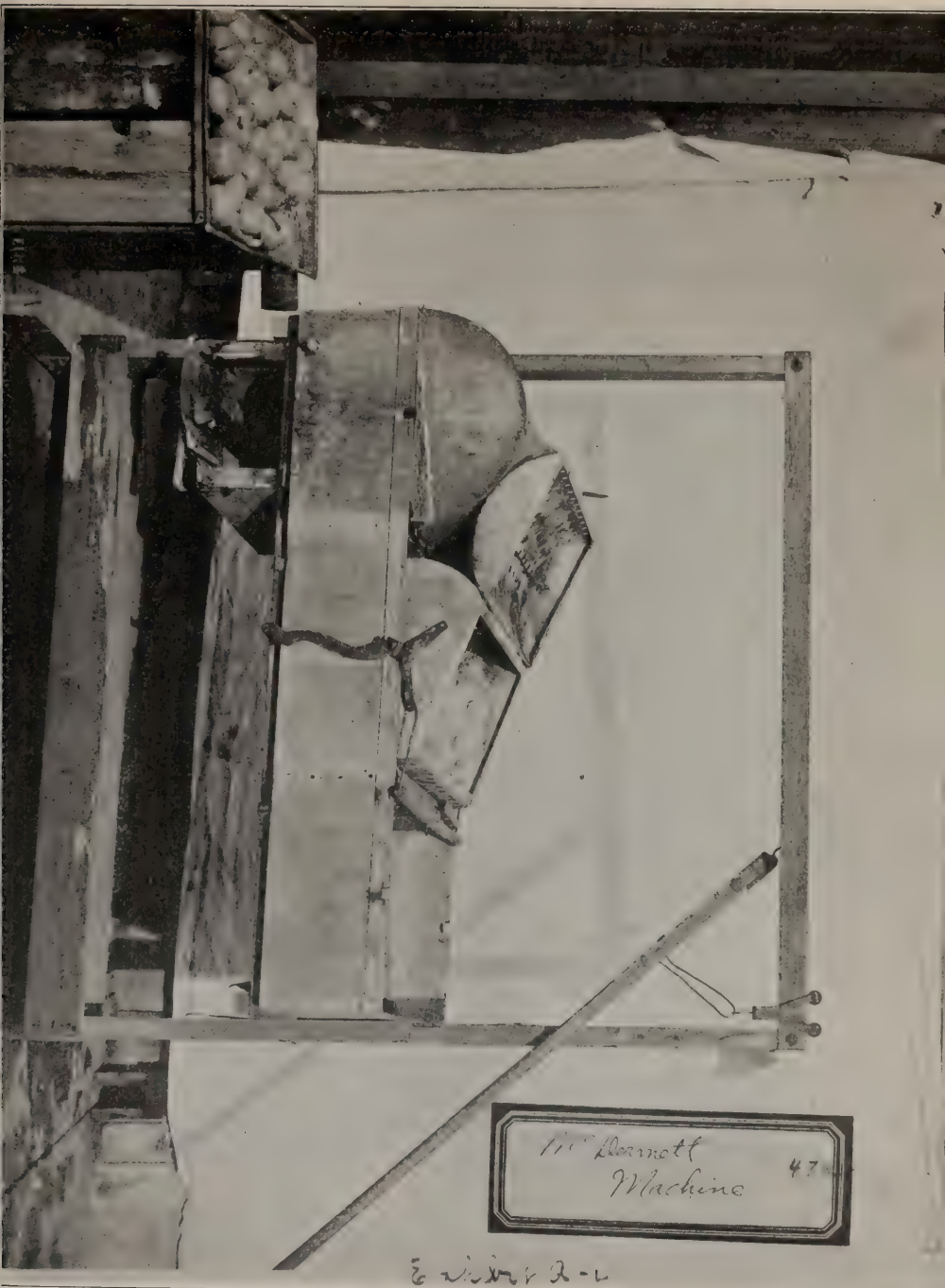
448 *Central California Canneries Company et al.*  
Exhibit "A-3."



[On reverse side:] #4 EXHIBIT #43.  
TEXAS MACHINE (McDERMETT MA-



Exhibit "A-4."



[On reverse side:] #5 EXHIBIT #43.  
TEXAS MACHINE (McDERMETT MA-  
CHINE)

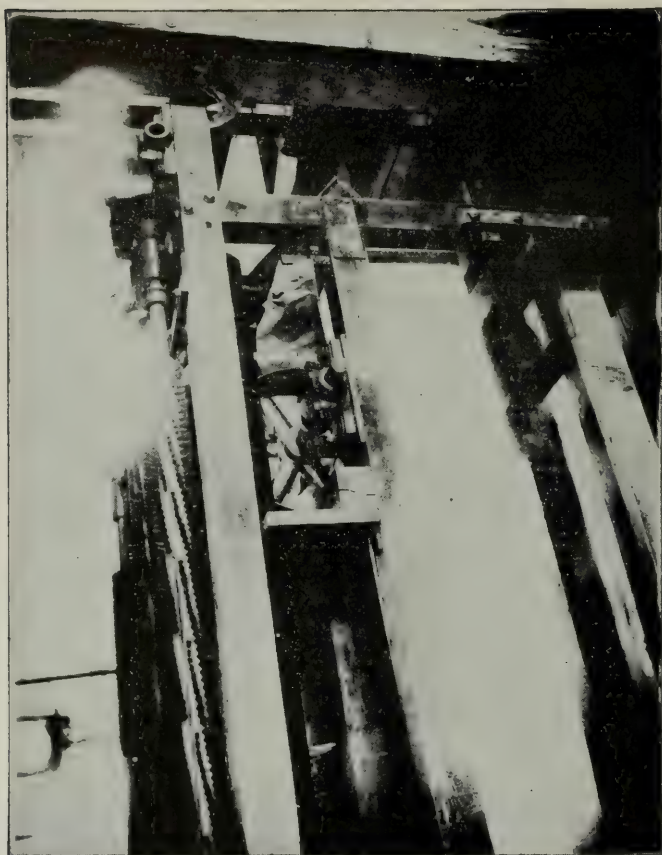
**Exhibit "A."**

(Attached to Affidavit of George Harold.)

128

476

"Dunkley's Exhibit No. 2, Photograph 1 of Second  
Machine."



**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."

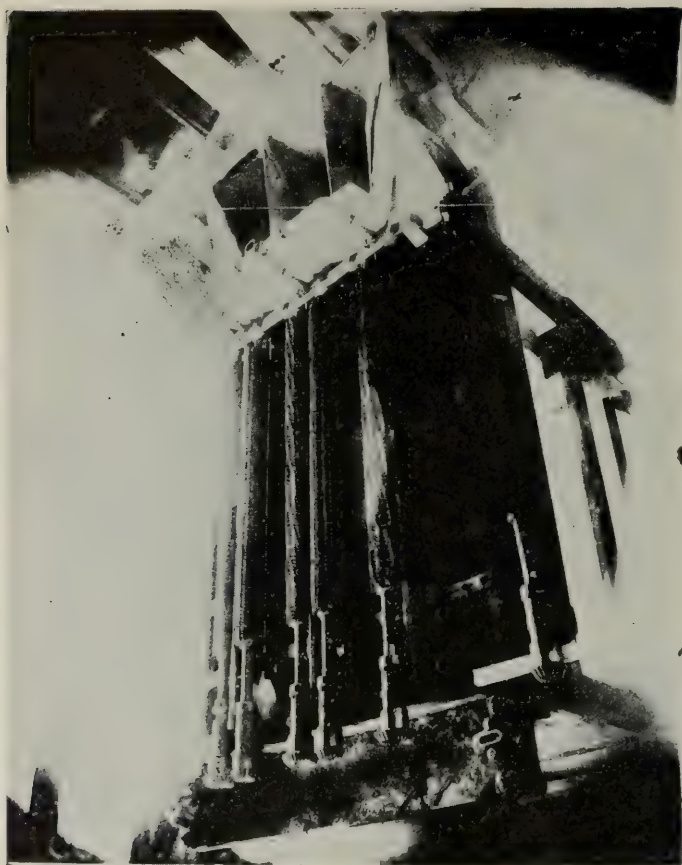


**Exhibit "C."**

130

478

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."





Plaintiff's Exhibit "A."

(Attached to Affidavit of John Hetherington.)

THE DUNKLEY COMPANY, INC.,  
A CORPORATION,  
PLAINTIFF,  
vs.  
THE DUNKLEY COMPANY, INC.,  
A CORPORATION,  
DEFENDANT.

Appellants,

vs.

THE DUNKLEY COMPANY, INC.,  
A CORPORATION,

Appellee.

ORDER RETURNED FROM THE DISTRICT DIVISION  
OF THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF CALIFORNIA,  
SECOND DIVISION.

VOLUME II (Pages 449 to 1144, 1145)

CERTIFIED COPY OF WRITING OR RECORD  
OF RECORD AND PROCEEDINGS IN THE  
DISTRICT COURT OF THE UNITED STATES.

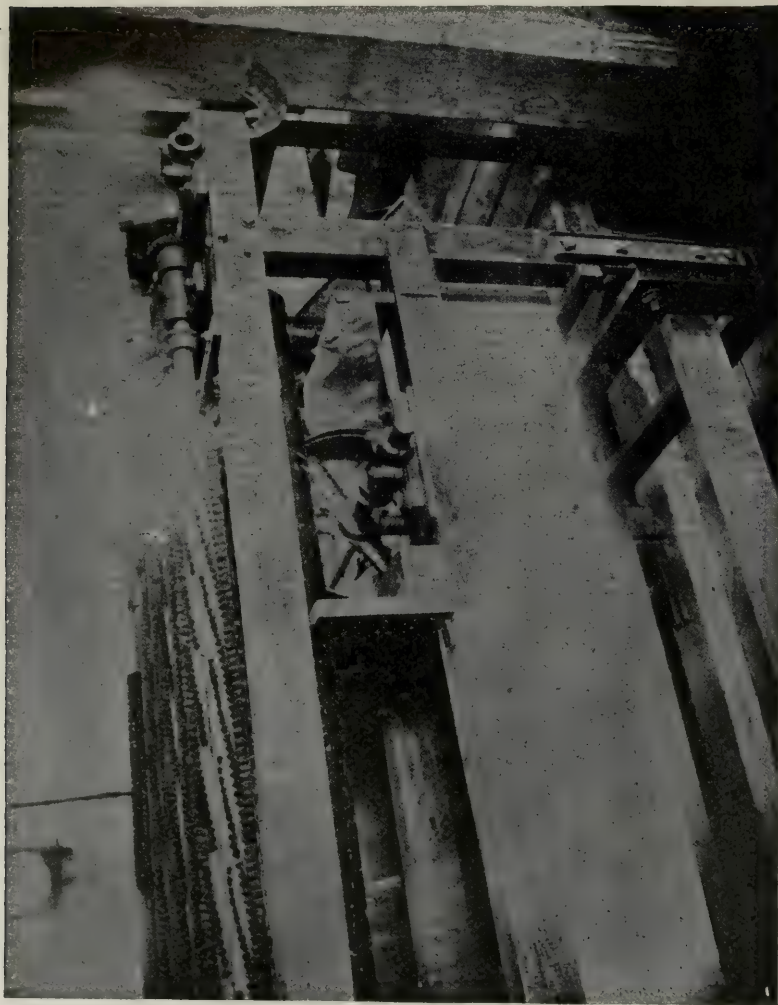


**Exhibit "A."**

*vs. Dunkley Company.*

1123

"Dunkley's Exhibit No. 2, Photograph 1 of Second Machine."



**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph of Second Machine."



**Exhibit "C."**

130

478

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."

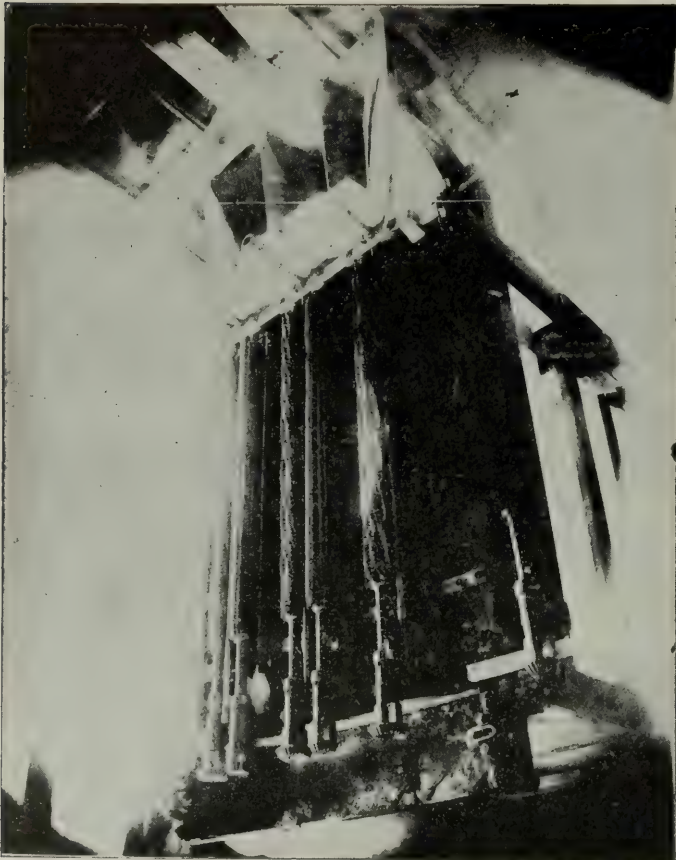
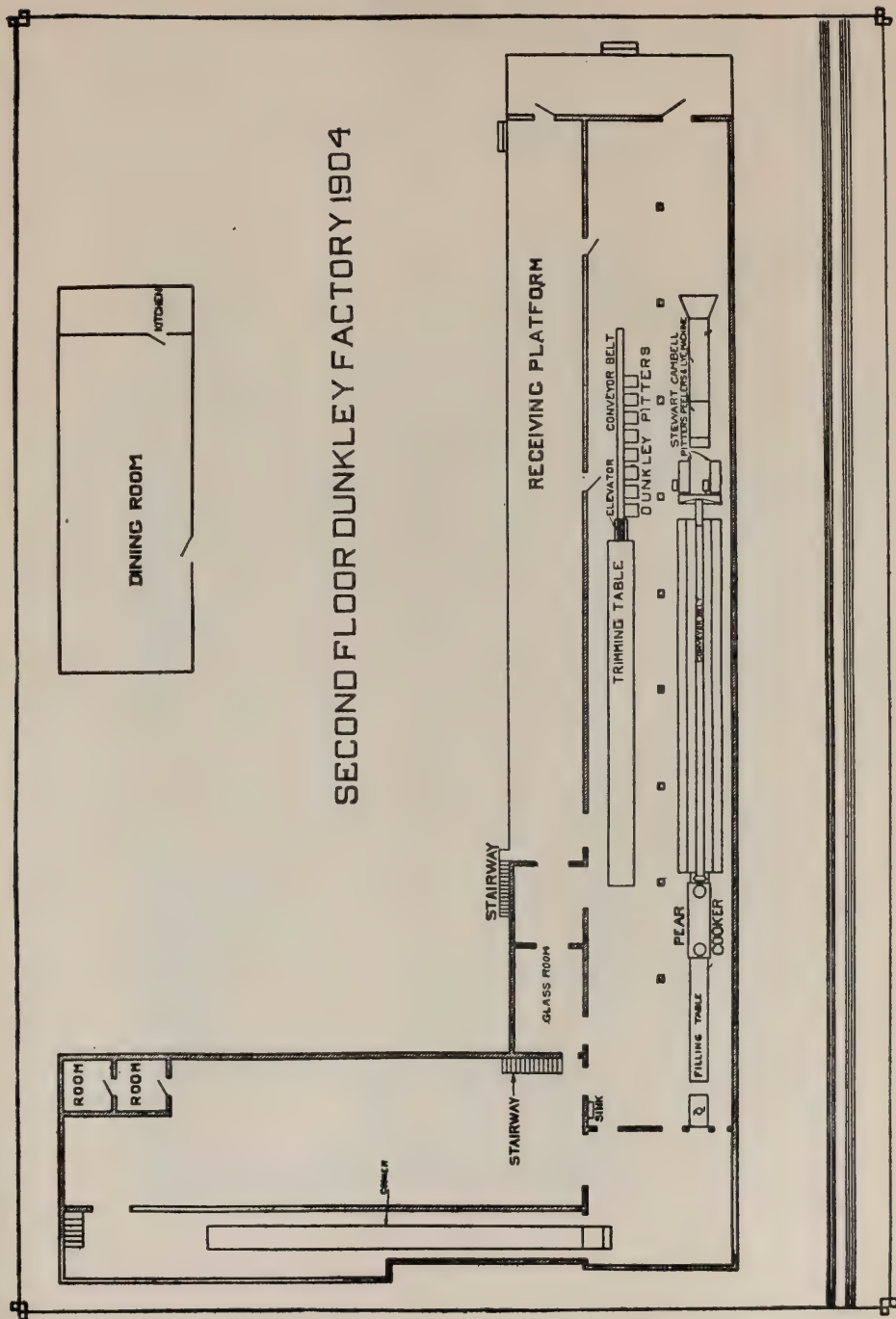


Exhibit "D."



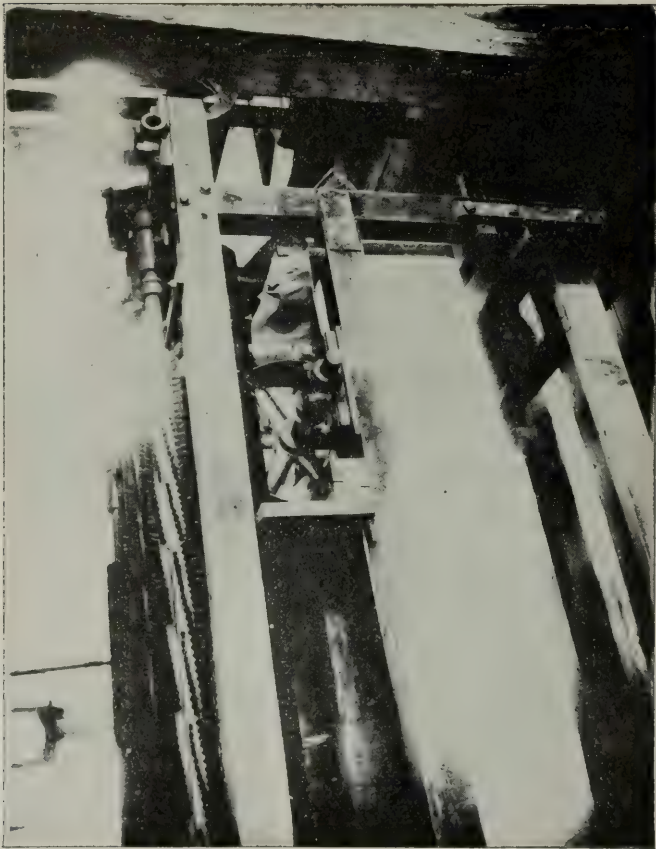
**Exhibit "A."**

(Attached to Supplemental Affidavit of John Hetherington.)

128

476

"Dunkley's Exhibit No. 2, Photograph 1 of Second Machine."





**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."

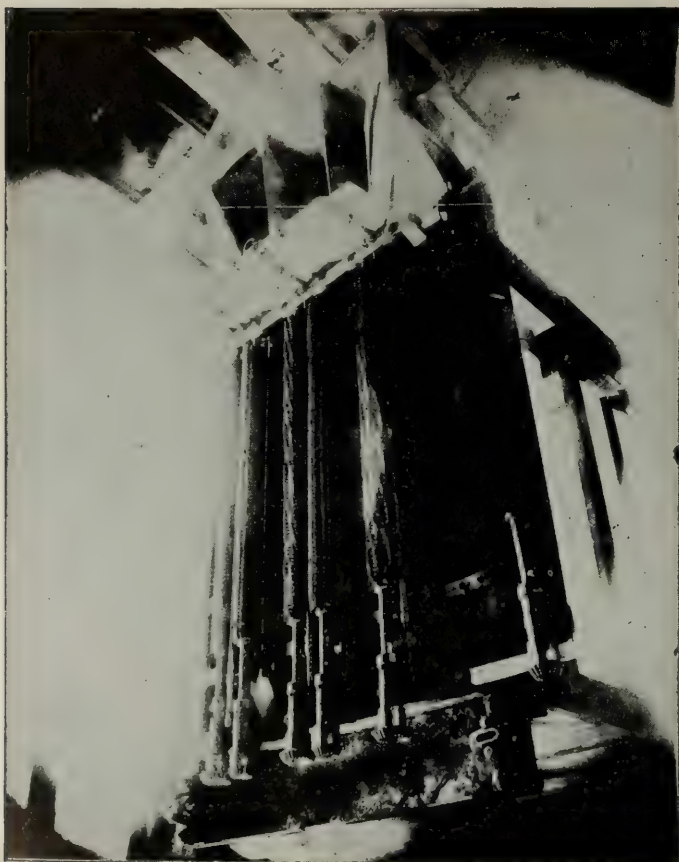


**Exhibit "C."**

130

478

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."

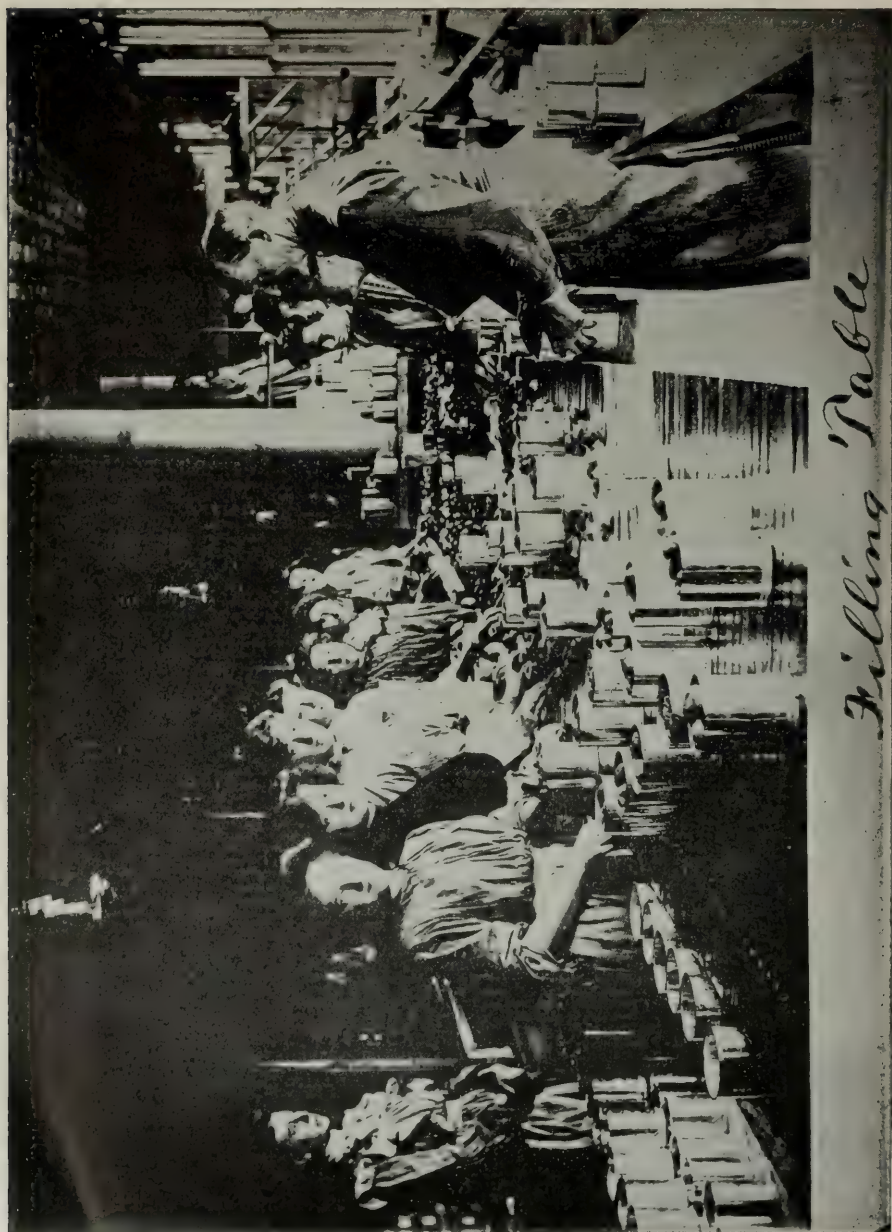


**Exhibit "A."**

(Attached to Affidavit of Mary Z. Hinderliter.)



Exhibit "B."



*Filling Table*









Exhibit "C."

695

331

644

APR. 20, 1903.

For Dunkley Co.,

City.

*Check*

1000	3 1/2%	812 50
1000	6	65
1000	7	2 67
1000	100 lb.	1 40
1000	15	50
1000	50% hr.	2 40
1000		2 40
1000		6 50
1000		4 00
1000		125 00
1000		100 00

✓

Enclosed herewith is a copy of the check made by the Dunkley Co. for the amount of \$1000.00. Please return the check to the Dunkley Co. by return mail.

462

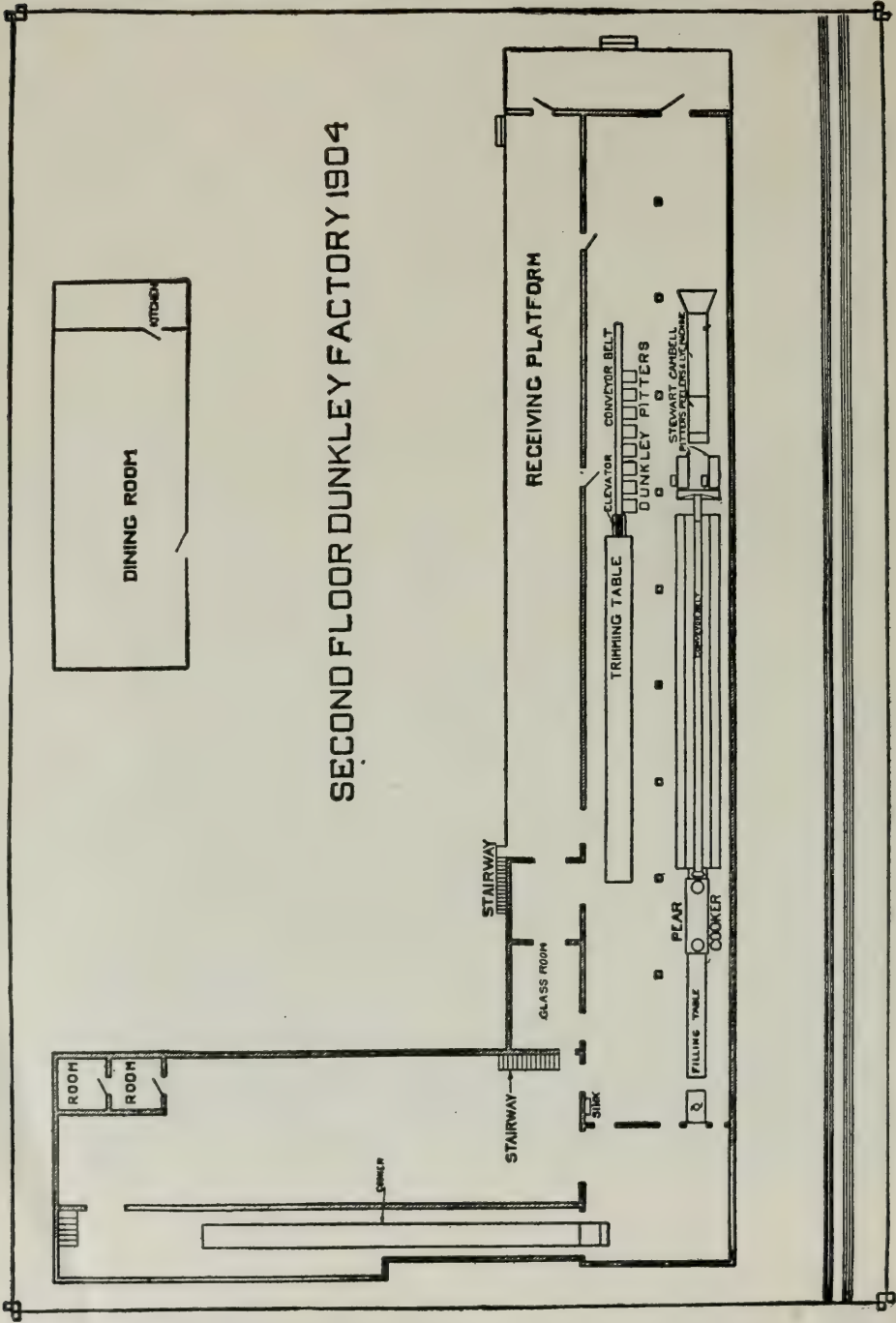
101

*Check*

✓

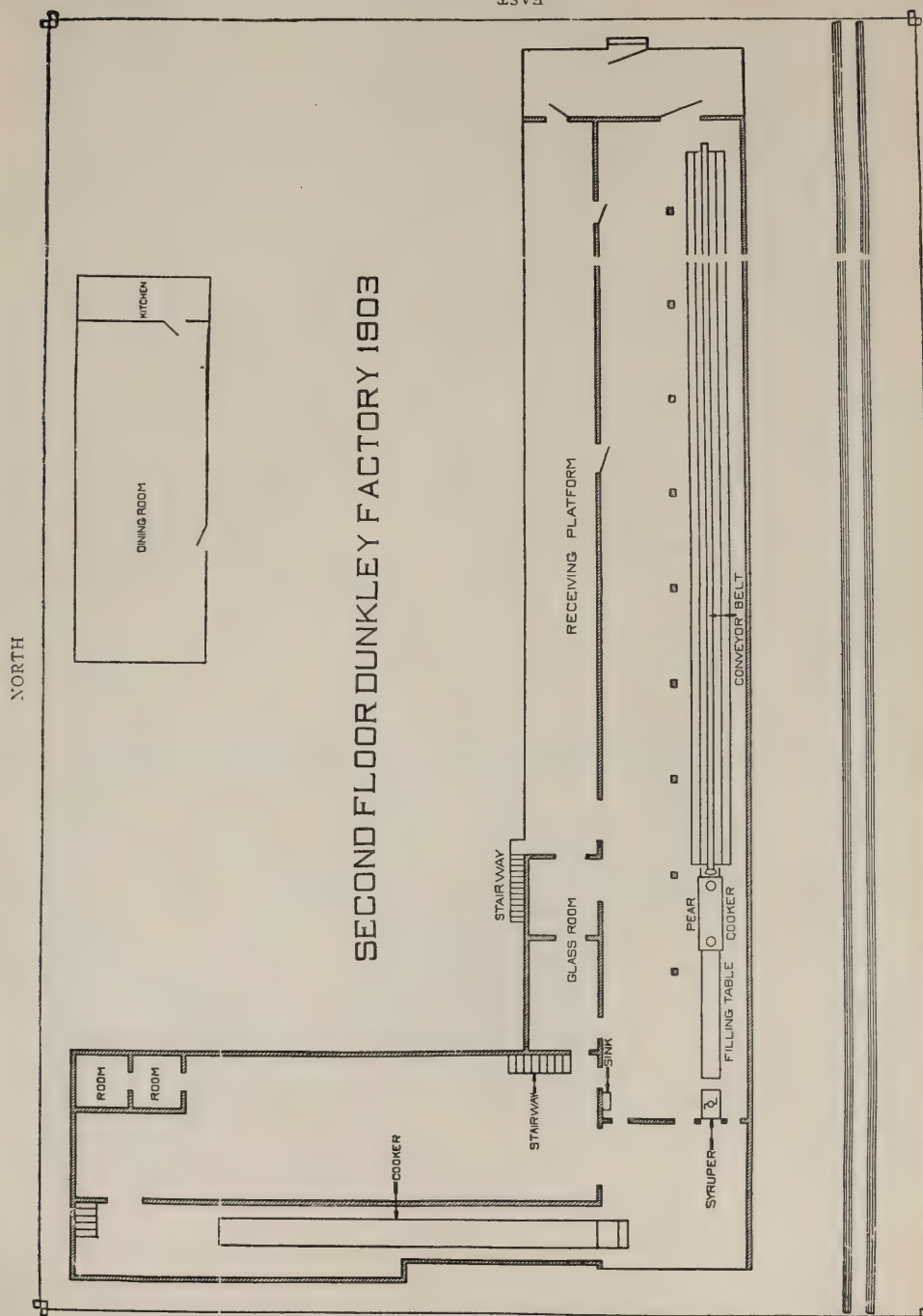
**Exhibit "A."**

(Attached to Affidavit of Bert McFarland.)



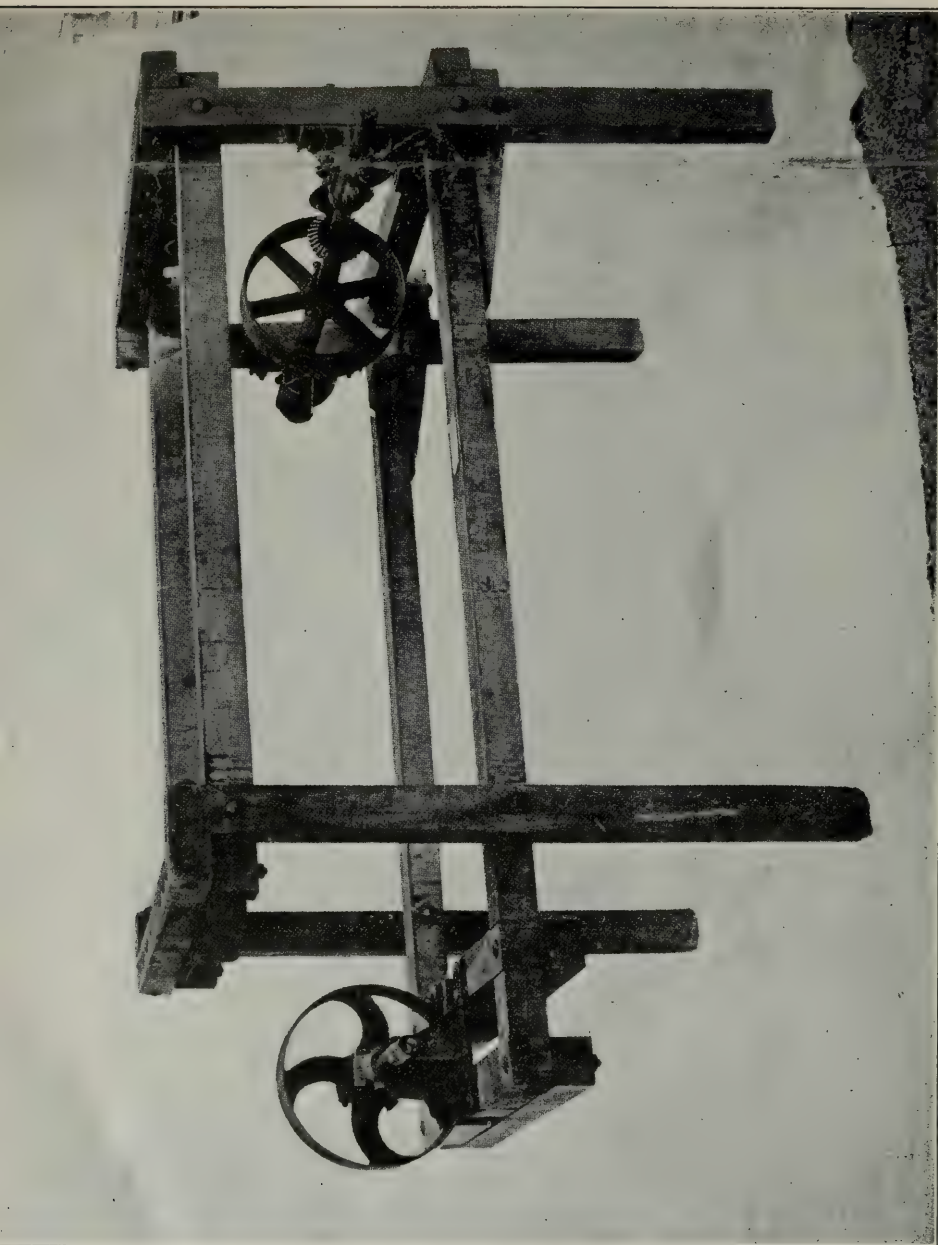
**Exhibit "A."**

(Attached to Affidavit of Arthur W. Norton.)





**Exhibit "B."**



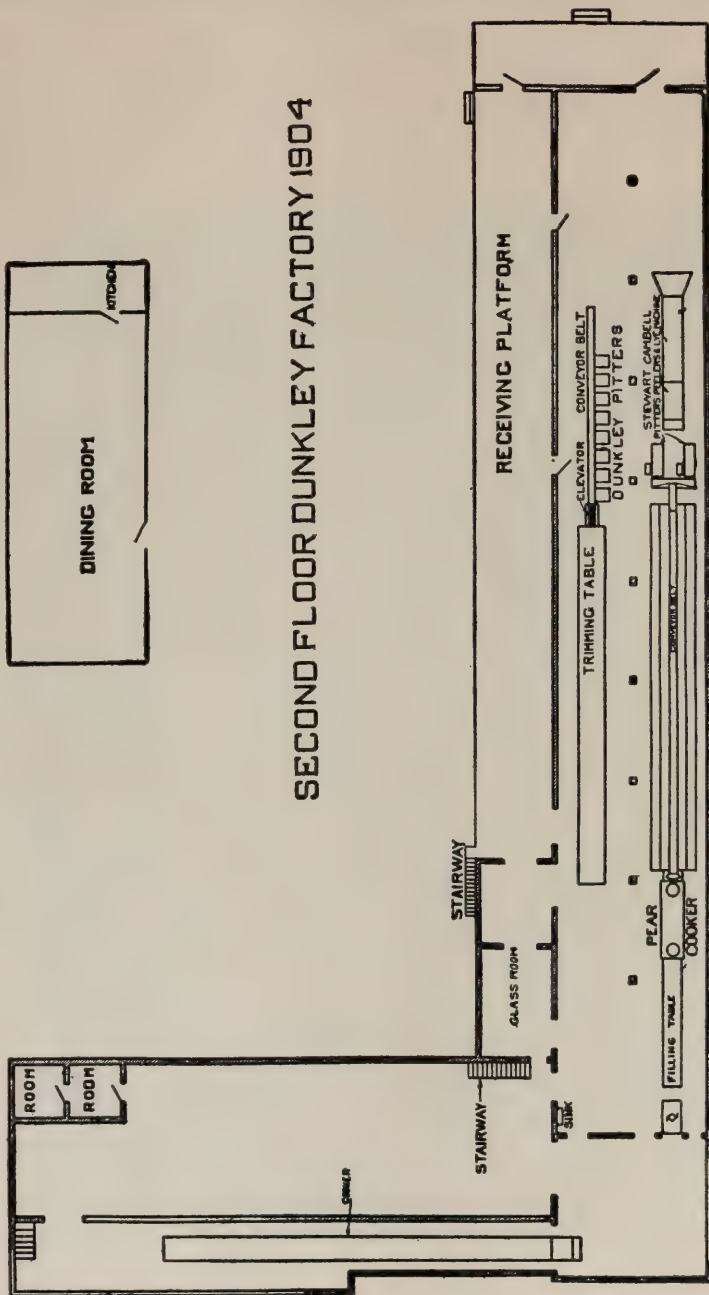
Photograph of Dunkley's First Machine (3N L. A., Ex. No. 11; 5NS. F., Ex. No. 10; 4N Int., Ex. No. 1).  
Conceived and Disclosed August, 1903. Constructed September-October, 1903.



Exhibit "C."

EAST

NORTH



SECOND FLOOR DUNKLEY FACTORY 1904

WEST

SOUTH

(L. A. Exhibit 6—For Identification)

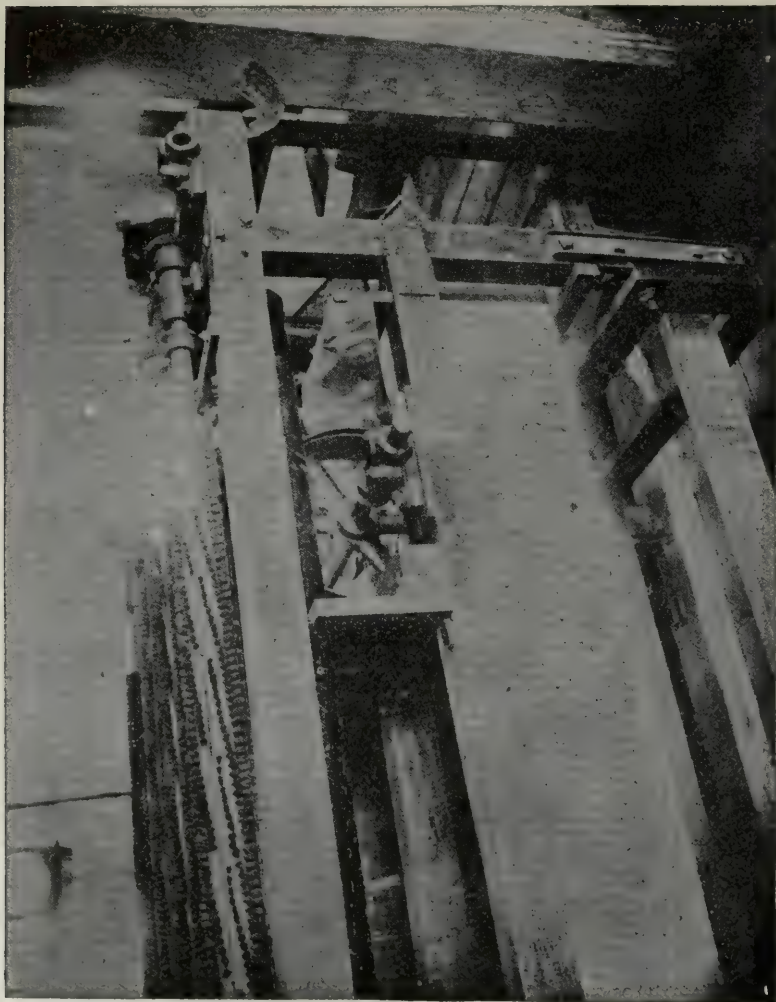
**Exhibit "A."**

(Attached to Supplemental Affidavit of Arthur W.  
Norton.)

128

476

"Dunkley's Exhibit No. 2, Photograph 1 of Second  
Machine."

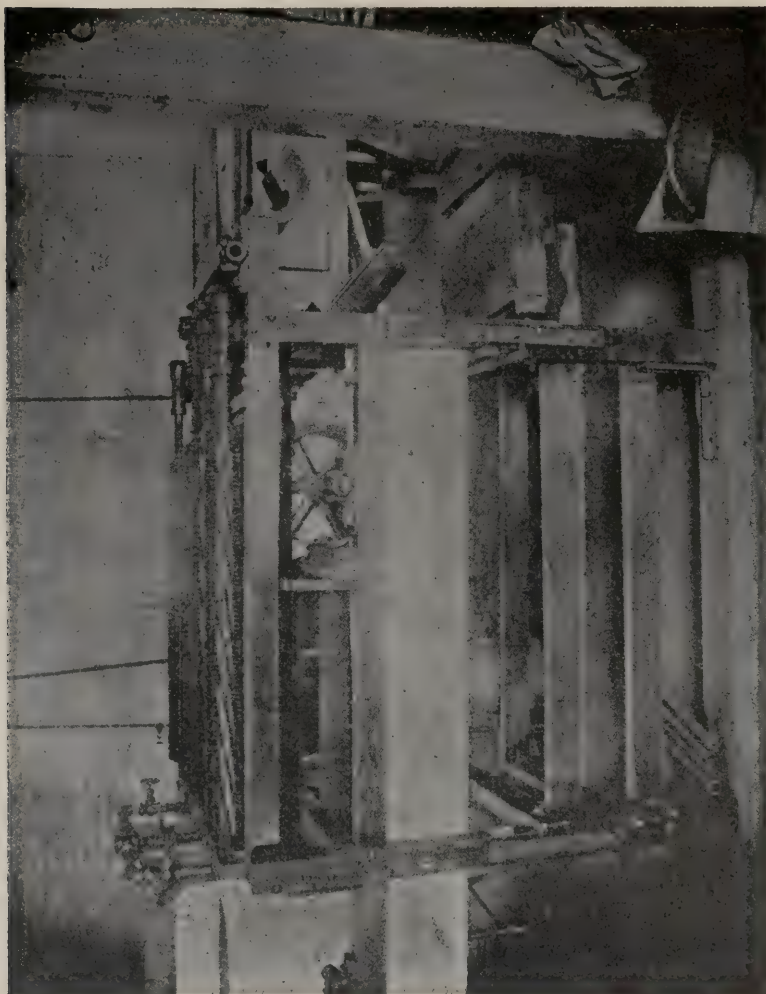


**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."

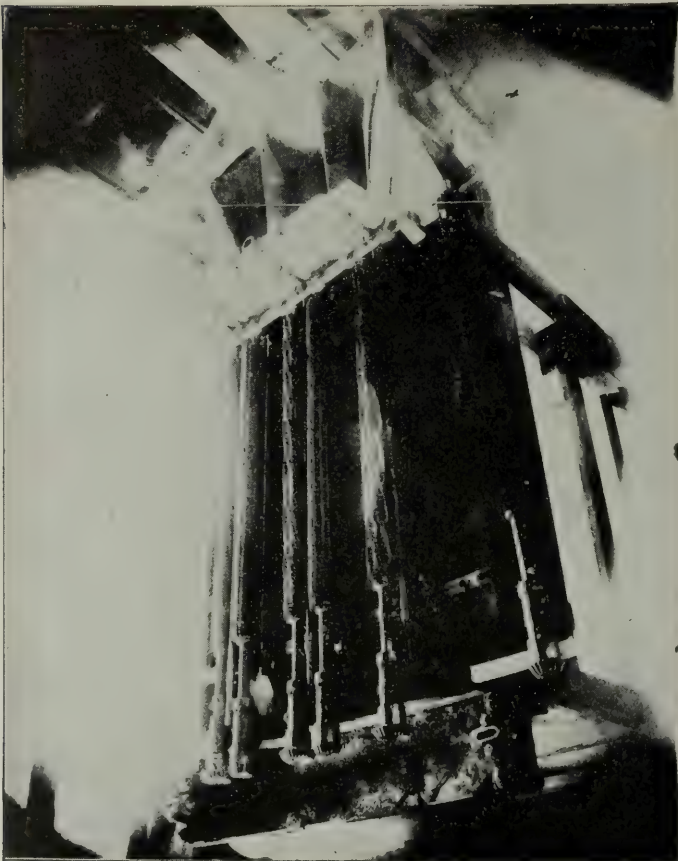


**Exhibit "C."**

130

478

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."





**Exhibit "A."**

(Attached to Affidavit of Nicholas Plating.)

695

331

Aug. 20, 1903.

To Dunkley Co.,

City.

Cash

Steel	3 1/2	\$10 50
1" boiler wheels	0	05
11" x 5" discs with nuts	7	2 87
1" rubber packing	100 lb.	1 40
1" bolts complete	15	30
10" square work	600 lb.	6 00
		3 14
		6 10
		4 00
		243 80

✓

Enclosed find the receipt attached  
 I hereby certify a copy of the charges made to us for plating, etc.  
 and that you will find what it cost us. Please return the  
 enclosed to the Nickel Plating Co., at return bill.

462

101

Cash

✓



**Exhibit "A."**

(Attached to Supplemental Affidavit of Nicholas  
Plating.)



NO. C-8 591
Dunkley
vs.
Pasadena
Dept. L-100
35
June 13 1918
WILLIAMS, Clerk
Geo. W. Cannon
Deputy Clerk

Exhibit "B."

30 X 4 one sheet  $96 \times 50 \times \frac{5}{16} = 33 \text{ sq ft}$

423

2 Heads  $34 \times 3\frac{3}{8} = 97$  each 199 493  
398  
95

2 "  $34 \times 2\frac{1}{2} = 81$  each

162

$2\frac{1}{4} = 5'$  to the post  $5'4" = 4$  in handles  
2 in center handle  $6'8"$

2 studs



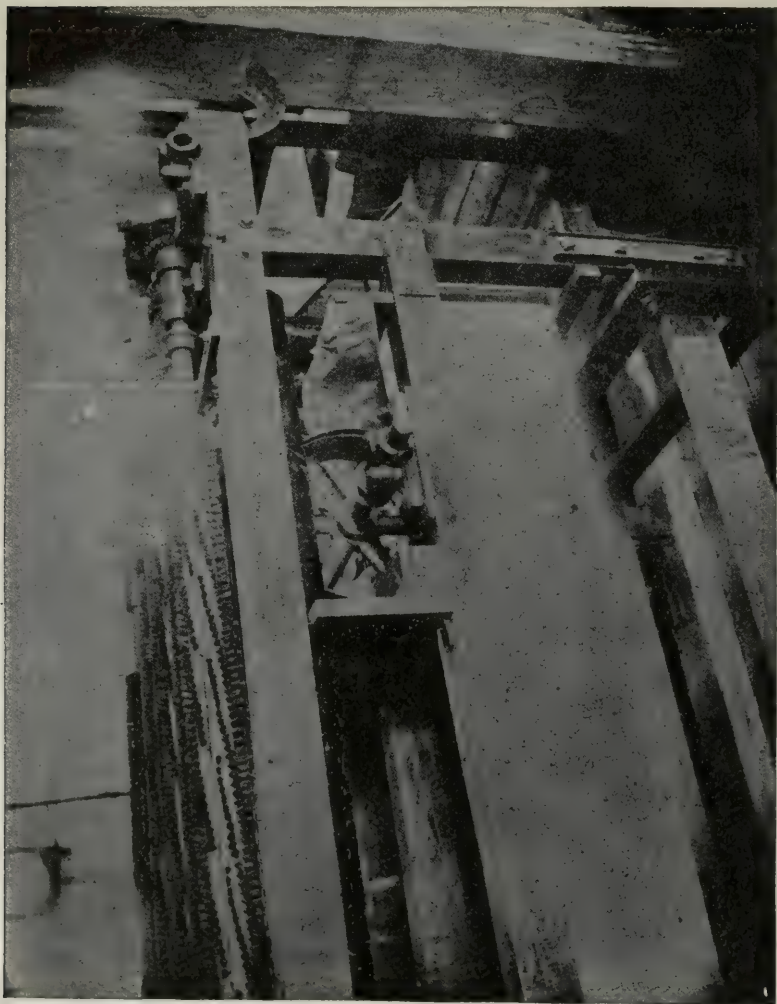
**Exhibit "A."**

(Attached to Affidavit of Daniel P. Robinson.)

128

476

"Dunkley's Exhibit No. 2, Photograph 1 of Second Machine."

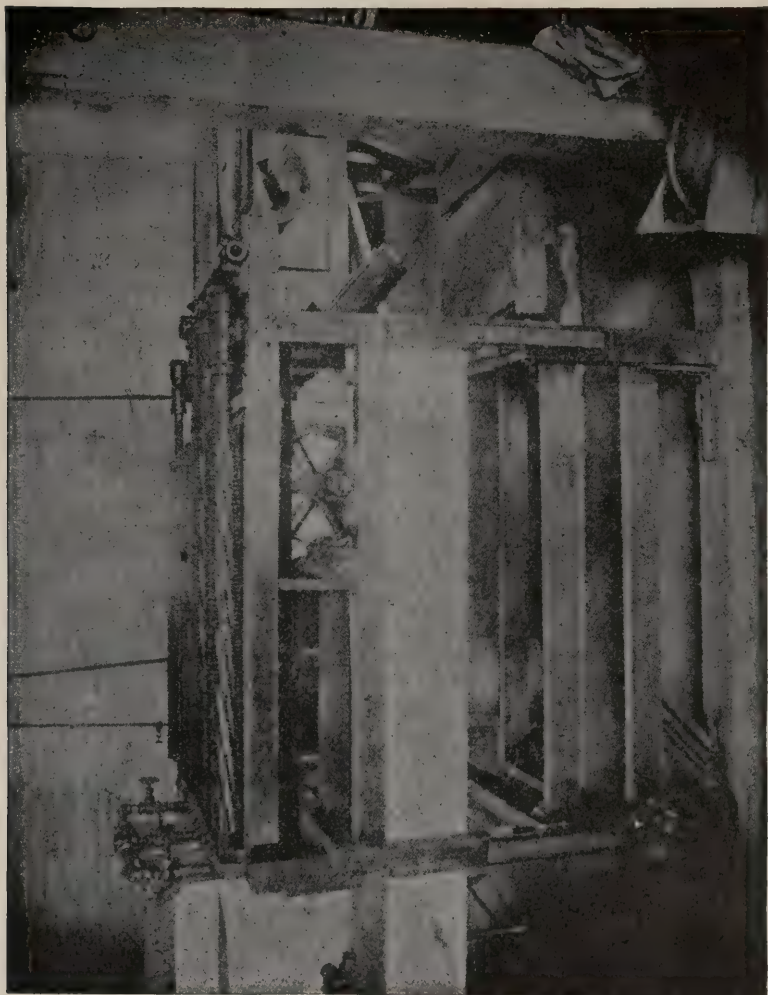


**Exhibit "B."**

129

477

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."



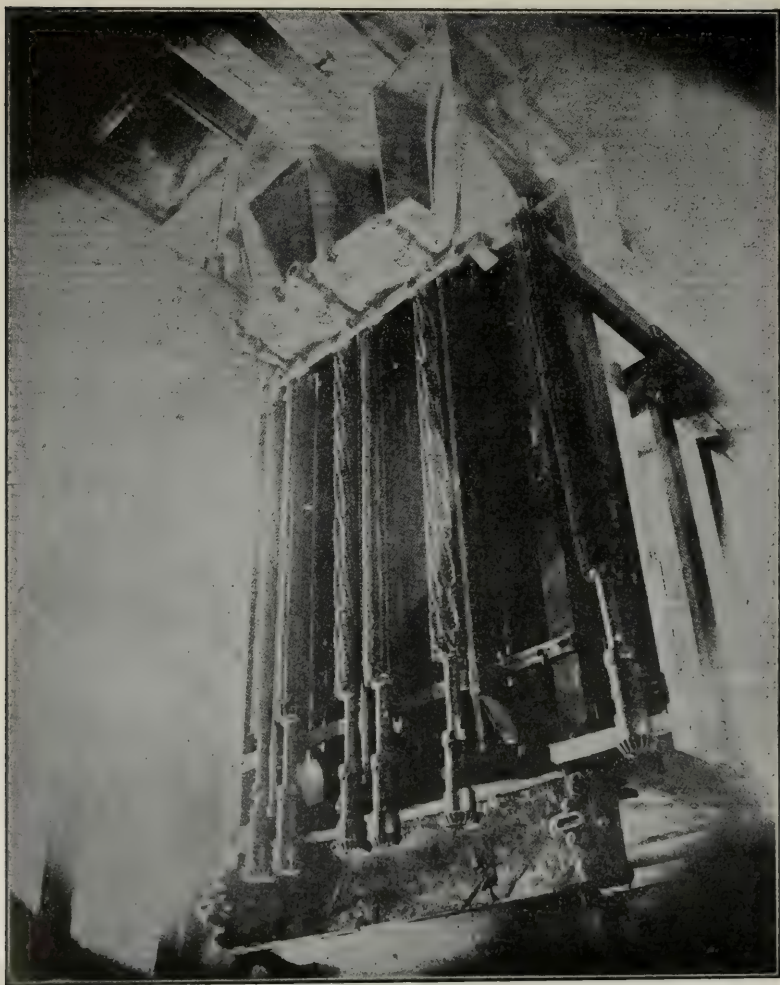


**Exhibit "C."**

130

478

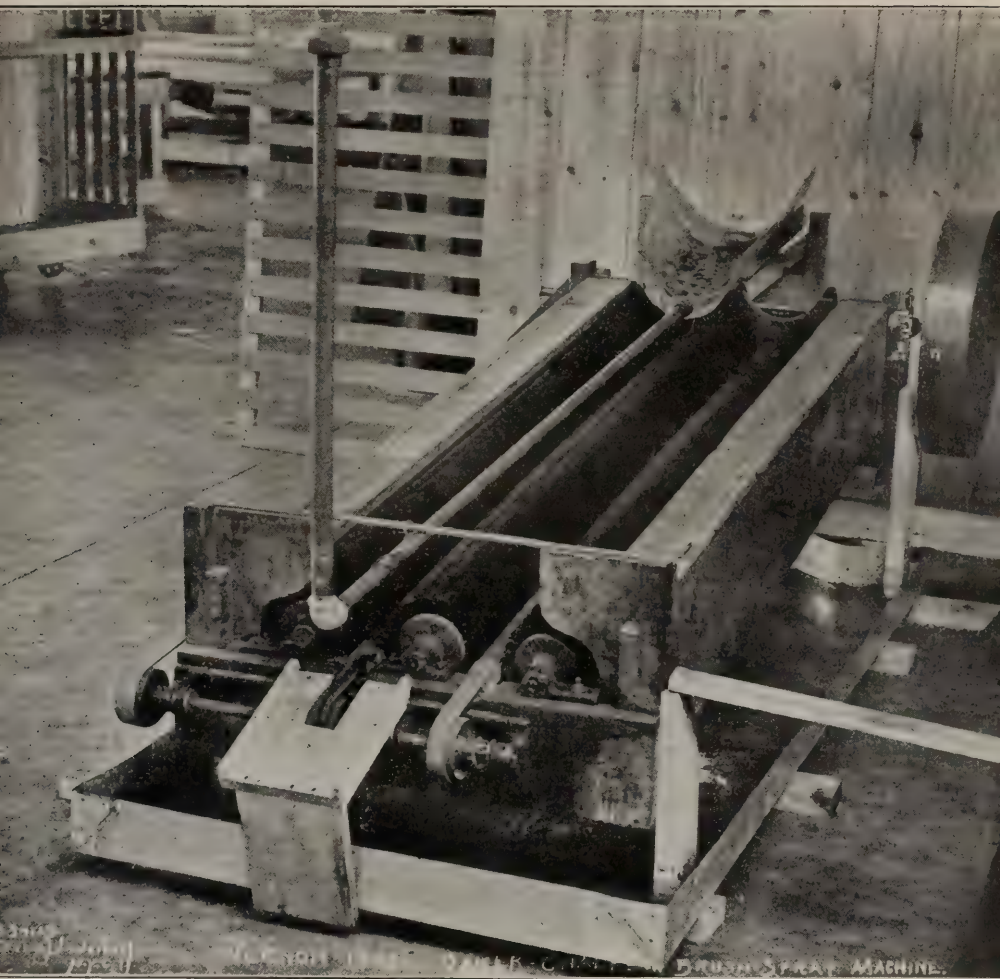
"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."





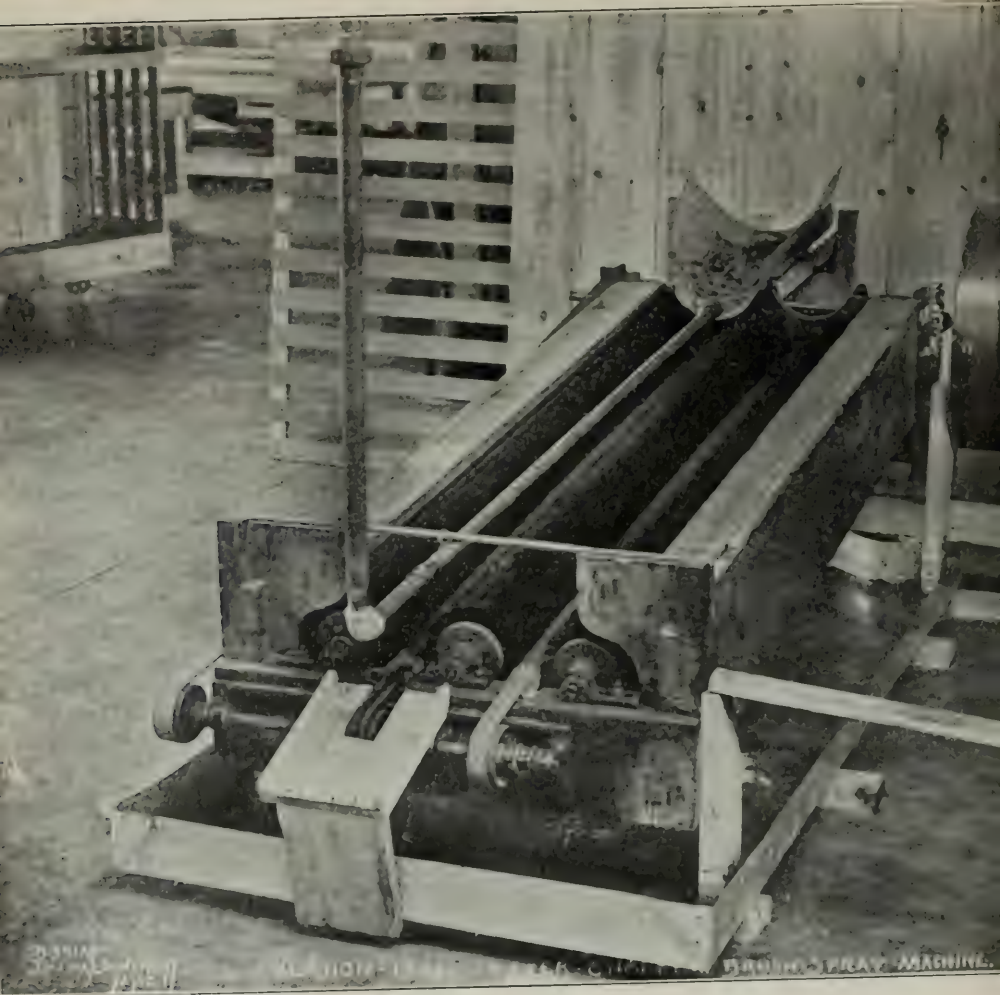
**Exhibit "A."**

(Attached to Affidavit of Fred Stebler.)



**Exhibit "A."**

(Attached to Affidavit of Harrie E. Stewart.)





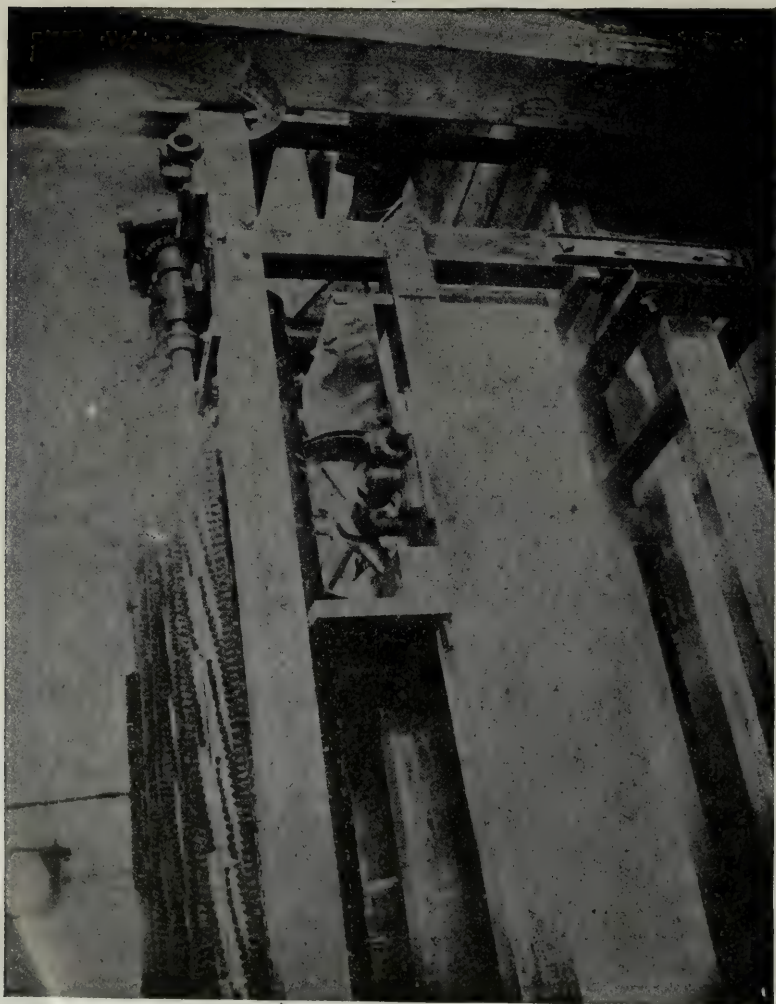


**Exhibit "A."**

*vs. Dunkley Company.*

1123

"Dunkley's Exhibit No. 2, Photograph 1 of Second Machine."



**Exhibit "B."**

1124 *Central California Canneries Company et al.*

"Dunkley's Exhibit No. 2, Photograph 2 of Second Machine."



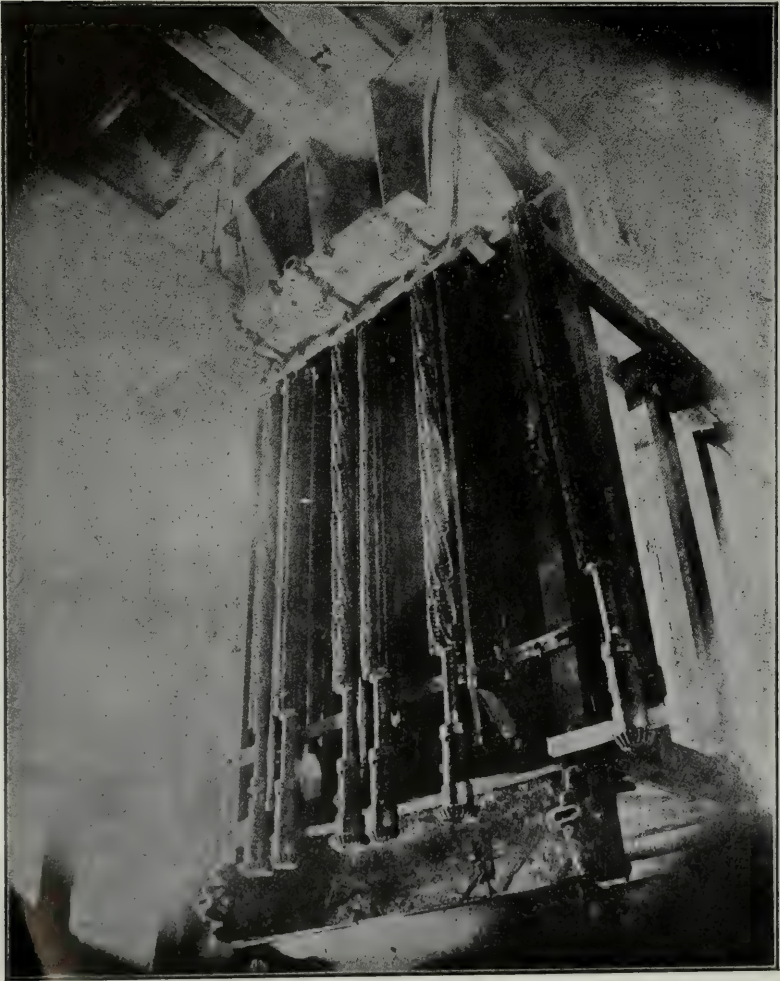


**Exhibit "C."**

*vs. Dunkley Company.*

1125

"Dunkley's Exhibit No. 2, Photograph 3 of Second Machine."



**UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

————— 18

CENTRAL CALIFORNIA CANNERIES COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
GRIFFIN & SKELLEY COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
J. C. AINSLEY PACKING COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
ANDERSON-BARNGROVER MANUFACTURING COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
GOLDEN GATE PACKING COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
J. F. PYLE & SON, INC.,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
HUNT BROTHERS COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.
SUNLIT FRUIT COMPANY,	Appellant,
vs.	
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,	Appellees.

**NOTICE OF MOTION AND PETITION FOR LEAVE TO FILE IN  
THE SOUTHERN DIVISION OF THE UNITED STATES DIS-  
TRICT COURT FOR THE NORTHERN DISTRICT OF CALI-  
FORNIA, SECOND DIVISION, AN ORIGINAL BILL IN THE  
NATURE OF A BILL OF REVIEW.**

Filed

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER CAMPBELL,  
Solicitors and Counsel for Petitioners.



## INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Notice of Motion (Anderson-Barngrover Manufacturing Company).....	71
Notice of Motion (J. C. Ainsley Packing Company) .....	66
Notice of Motion (Central California Canneries)	56
Notice of Motion (Golden Gate Packing Company).....	76
Notice of Motion (Griffin & Skelley Company).	61
Notice of Motion (Hunt Brothers Company)..	1
Notice of Motion (J. F. Pyle & Son, Inc.).....	81
Notice of Motion (Sunlit Fruit Company).....	86
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (J. C. Ainsley Packing Company).....	68
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in	

Index.	Page
the Nature of a Bill of Review (Anderson-Barngrover Manufacturing Company)....	73
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (Central California Canneries).....	58
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (Golden Gate Packing Company).....	78
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (Griffin & Skelley Company).....	63
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (Hunt Brothers Company).....	3
Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (J. F. Pyle & Son, Inc ).....	83



Index.

Page

Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review (Sunlit Fruit Company).....	87
---	----



United States Circuit Court of Appeals for the  
Ninth Circuit.

HUNT BROTHERS COMPANY,

Petitioner,

vs.

DUNKLEY COMPANY,

Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning & Machinery Company, and to Messrs. Fred L. Chappell and W. A. Richardson, Counsel and Silicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that on February 6, 1922, at the hour of 10:30 A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled Court in the United States Post Office and Court-house Building in the City and County of San Francisco, California, Hunt Brothers Company will move the Court for an order permitting it to file a bill in the nature of a bill of review to have reviewed, reversed and set aside that certain interlocutory decree made and entered in the United States District Court for the Northern District of California, Southern Division, Second Division, on December 8, 1916, in the case of *Dunkley Company*, Plaintiff, vs. *Hunt Brothers Company*, Defendant, Equity No. 211, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and

things set forth in said petition, and on the record in the above-entitled Court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, v. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company*, and *George E. Grier*, Defendants-Appellees, No 3316.

W. J. CARR,  
 FREDERICK S. LYON,  
 FRANCIS J. HENEY,  
 KEMPER CAMPBELL,  
 Solicitors for Petitioner.

---

In the United States Circuit Court of Appeals for  
 the Ninth Circuit.

HUNT BROTHERS COMPANY, a Corporation,  
 Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
 Respondent.

**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

Hunt Brothers Company, a Corporation, presents this its petition against Dunkley Company, a corporation, and respectfully shows:

*I. Proceedings had in cause sought to be reviewed:*

(a) On or about August 6, 1915, Dunkley Company, a Michigan corporation (but not the same Dunkley Company named as the respondent herein), filed in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, its bill of complaint against Hunt Brothers Company, a corporation, the petitioner herein, for infringement of patent No. 1,104,175, and in which it is alleged that on and prior to November 29, 1904, Samuel J. Dunkley had invented a machine covered by said patent, and that prior to the issuance of said patent, the said Dunkley had sold and assigned to the plaintiff in said bill of complaint, the said invention and application, together with such letters patent as might be granted thereon. Said bill of complaint further alleged infringement of said patent by the defendant therein, and prayed for an injunction against further infringement, and for profits realized by the defendant and damages sustained by the said plaintiff by reason of such infringement.



(b)    Thereafter, to wit, on or about October 14, 1915, Hunt Brothers Company duly filed its answer to said bill of complaint, and in said answer, among other defenses, denied that the said Samuel J. Dunkley was the original or first inventor of said alleged invention, and alleged that the said Dunkley surreptitiously and unjustly obtained the patent for that which in fact was first invented by another, to wit, G. E. Grier, who at all times was using reasonable diligence in adapting and perfecting the same.

(c)    Thereafter, to wit, on March 24, 1916, said case duly came on for trial in said District Court on the issues made by the pleadings therein. Proofs were adduced to by the parties, and thereafter, to wit, on April 6, 1916, the case was submitted to the Court for decision.

(d)    Thereafter, to wit, on December 4, 1916, the Judge of said District Court orally announced his decision in said case, to the effect that the said patent was valid and infringed; thereafter, to wit, on December 8, 1916, an interlocutory decree in said case was duly made and entered, adjudging and decreeing that the said defendant had infringed said patent and that it be permanently enjoined and restrained from making, using or selling any machine or other device infringing said patent, and further adjudging and decreeing that the said plaintiff recover from said defendant in said case the profits realized by the defendant, and the damages sustained by the plaintiff, by reason of said infringement, and that the cause be referred to H. M. Wright, Esq.,

Standing Master in Chancery of the court, for an accounting of such profits and damages.

(e) Thereafter, to wit, on or about December 27, 1916, the defendant in said case appealed from said decree to this court.

(f) Thereafter, to wit, on or about October 1, 1917, the said decree of the District Court was affirmed by this Court.

(g) Thereafter, to wit, on or about May—, 1917, said Hunt Brothers Company petitioned the Supreme Court of the United States to issue its writ of certiorari to review said order of this court in said case; and said petition was thereafter on or about December, 1917, denied by said Supreme Court.

(h) Coincidentally with the filing of said bill of complaint against Hunt Brothers Company, as alleged in subdivision (a) of this paragraph, said Dunkley Company filed in said United States District Court, similar bills of complaint against Central California Canneries, Griffin & Skelly Company, J. C. Ainsley Packing Company, Anderson-Barnbrover Manufacturing Company, Golden Gate Packing Company, J. F. Pyle & Son, Inc., and Sunlit Fruit Company. The defendants in each of said cases filed answers to said several bills of complaint similar in form and effect to the said answer filed by said Hunt Brothers Company, and at the same time, and said seven cases and said case of *Dunkley Company vs. Hunt Brothers Company*, pursuant to stipulation and upon order of the Court, were tried together and at the same time. Similar decrees were entered in each and at the same time, and simi-

lar proceedings were had and taken, and orders made on appeal and in connection with said application to the Supreme Court, as in said case of *Dunkley Company vs. Hunt Brothers Company*, as hereinbefore alleged, and at the same time, and on said appeal and on said application to the Supreme Court, but a single record was presented and used in all of said cases.

(i) The record on appeal to this Court, in said case of *Dunkley Company vs. Hunt Brothers Company* and the other seven cases referred to, is in the records of this Court and is designated No. 2915, "*Central California Canneries Company, a Corporation, Griffin & Skelley Company, J. C. Ainsley Packing Company, Anderson-Barngrover Manufacturing Company, Golden Gate Packing Company, J. F. Pyle & Son, Incorporated, Hunt Brothers Company, Sunlit Fruit Company, a Corporation, Appellants, vs. Dunkley Company, a Corporation, Appellee.*" Said record discloses the proceedings had and taken in said cases, together with the evidence and proofs adduced by the respective parties thereto, and reference is hereby made thereto for a more complete statement of the proceedings had and proofs taken in the said case of *Dunkley Company vs. Hunt Brothers Company* and the other said cases hereinbefore referred to, and the same is made a part hereof to the same effect as if said record was herein set forth at length.

(j) No accounting pursuant to said interlocutory judgment and decree of the District Court in said case of *Dunkley Company vs. Hunt Brothers Company* or in the other said cases herein referred to,

has been had or taken, and said interlocutory decree stands unmodified except as it may have been affected by the order of said District Court of August 22, 1921, and referred to in subdivision (L) of paragraph II hereof.

II. *Further proceedings in said cause:*

(a) On December 21, 1915, Dunkley Company filed in the District Court of the United States for the Southern District of California, Southern Division, its bill of complaint against Pasadena Canning Company for infringement of said patent No. 1,104,175. Thereafter said defendant in said case filed its answer which was substantially similar to the answer of Hunt Brothers Company as alleged in subdivision (b) of paragraph I hereof, setting up, however, certain defenses not pled in said answer of Hunt Brothers Company. In January, 1918, said case was set for trial on May 1, 1918. Defendant therein prepared diligently for trial, and arranged to have present at said trial a large number of witnesses who would testify as to the dates of the conception and reduction to practice of the alleged invention embodied in said letters patent.

(b) Thereafter and on March 18, 1918, plaintiff in said action moved to dismiss said suit without prejudice to the right of plaintiff to commence a new suit for the same cause of action, which said motion was resisted by the defendant and was, on March 25, 1918, after having been argued by the respective parties, submitted.

(c) Thereafter, to wit, on April 15, 1918, and while said motion was still under submission and un-



decided, said plaintiff petitioned the Court for leave to dismiss said suit without prejudice, upon the ground that the name of the plaintiff, on January 12, 1916, had been changed to Michigan Canning & Machinery Company, and that at or about the same time a new corporation had been formed under the laws of the State of Michigan, entitled Dunkley Company, and that on or about July 25, 1916, the said Michigan Canning & Machinery Company, formerly known as Dunkley Company and the plaintiff in said case, had sold and assigned the patent in suit to the new Dunkley Company, and that the said Michigan Canning & Machinery Company, plaintiff in said suit, no longer had any interest in the case and the patent in suit. This motion was regularly argued by the respective parties and taken under advisement. Subsequently said motion, as well as the preceding motion to dismiss, hereinbefore referred to, was denied.

(d) This last-mentioned motion, with the affidavits upon which based, gave to the petitioner the first intimation or knowledge that the plaintiff in said case of *Dunkley Company vs. Hunt Brothers Company*, had parted with its interest in said patent and rights arising thereunder.

(e) Thereupon and on May 6, 1918, the petitioner and the several defendants in said other cases in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, moved this Court for an order and decree vacating and setting aside the orders and decrees theretofore made and entered



affirming the said interlocutory decrees in said cases in said District Court at San Francisco, and for an order and decree reversing, vacating and setting aside said interlocutory decrees, on the ground that each of said causes had abated at the time of such sale, assignment and transfer of patent, and that all proceedings had and taken subsequent to such sale, assignment and transfer were nugatory.

(f) Thereafter this Court denied said motion, but directed that the mandate issue without prejudice to the right of the plaintiff-appellee to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiff-appellee might contend was or were proper or necessary party plaintiffs parties to the said actions.

(g) The proceedings hereinbefore in this paragraph set forth, and papers and records upon which based, are more fully stated in the record on appeal in the case of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, Equity No. 3316, in the records of this Court, and particularly in volume one thereof, and in the record in this Court of *Central California Canneries et al.*, Appellants, vs. *Dunkley Company*, Appellee, No. 2915, and particularly in the record of said motion and proceedings thereon, to which said records reference is hereby made, and the same are made a part hereof, to the same effect as if each of said records was herein set forth at length.

(h) On or about the —— day of August, 1918, the Dunkley Company, plaintiff in said case of *Dunkley Company vs. Hunt Brothers Company*, and plaintiff in said seven other cases in the United States District Court at San Francisco, gave notice that on August 19, 1918, it would move said District Court for an order making said new Dunkley Company a party plaintiff in said several cases, and the said new Dunkley Company, as a part of said notice, gave notice that it would move for an order substituting it as such party plaintiff.

(i) Thereafter Hunt Brothers Company and the other defendants in said cases in said District Court gave notice that they would move the said Court to request this Court for permission to reopen said cases and to receive newly discovered and additional and further evidence bearing on the validity of said letters patent 1,104,175.

(j) Such proceedings were had and taken as that both said motions were duly made and they came on for hearing before the District Court on February ——, 1919. At the suggestion of the Judge of said District Court, further hearing of said motions was continued until after the decision of this Court on the appeal of the Michigan Canning & Machinery Company and the Dunkley Company from the decree of the District Court of the Southern District of California, Southern Division, in said case against the Pasadena Canning Company, holding said letters patent to be invalid, and dismissing said bill, which said appeal was then pending in this Court.

(k) Thereafter said appeal having been determined, and the judgment of the District Court having been affirmed, said motions were, on August 9 and 10, 1920, brought on for hearing and were argued by the respective parties. The petitioner and the other defendants in said cases urged the District Court that all proceedings had and taken on said several cases were nugatory by reason of the fact that the plaintiff therein divested itself of all interest in the subject matter of said cases long prior to the trial of said cases, and prior to the entry of the interlocutory decrees therein, and that said interlocutory decree should be vacated, and that no order should be made admitting the new Dunkley Company as a party plaintiff in said cases, without the same being opened for the reception of new and additional evidence.

(l) Thereafter and about the 22d day of August, 1921, the District Court denied the motion of petitioner and the other defendants in said cases, and granted the motion of the plaintiff in said cases to add the said new Dunkley Company as a party plaintiff therein.

(m) The proceedings had and taken on said motions referred to in subdivisions (h) and (i) of this paragraph, and the grounds thereof, the papers upon which based, and the order of the said Court on said motions all appear more fully in the record on appeal taken by the petitioner and the defendants in said other cases, from said order granting said motion of the plaintiff, to this Court, to which said record reference is hereby made, and the same is

made a part hereof, with the same effect as if said record was herein set forth at length.

III. *Essential features of course sought to be reviewed:*

(a) The date of the application by S. J. Dunkley for the letters patent held to be valid and infringed in said cases referred to in paragraph I hereof, was November 29, 1904. In the trial of said cases in the said District Court at San Francisco, the plaintiff therein made out its *prima facie* case by adducing certain proofs as to the character of the machines used by the defendants. Thereupon the defendants in said cases adduced evidence, both oral and documentary, and proved, among other things, that (References are to the record on appeal in said cases, herein usually designated S. F. Rec.):

G. E. Grier, about August, 1902, conceived the idea of the machine which he subsequently constructed (and which admittedly was an infringing device, if the letters patent in question were valid), and at the time disclosed his conception to others (S. F. Rec. 304-5, 330-3, 363-6, 351).

In April, 1903, Grier employed W. H. Finley to construct for him two machines of commercial size (S. F. Rec. 237-9, 245, 253, 258, 305-6). These two machines were completed in July, 1903 (S. F. Rec. 309-11, 319, 358, 382-3, 239-40, 256, 296-7).

One of these machines was installed in the Pasadena Canning Company's plant at Pasadena, and the other, on or about August 1, 1903, was sold to the Eastside Canning Company of Los Angeles and



immediately installed in its plant there (S. F. Rec. 309-10 and *supra*).

Each of these machines was used commercially in these two plants during the entire 1903 season, and continuously for more than ten years thereafter, and each was a complete and unqualified commercial success (S. F. Rec. 315, 318, 380).

Said dates of the Grier invention were not questioned by the said District Court nor by this Court on appeal, but were accepted as correct in each.

(b) The plaintiff in said cases thereupon, because of the rule established in such cases as *Twentieth Century Mach. Co. vs. Loew* (C. C. A., Sixth Circuit), 243 Fed. 373, 381-2; *Clark Thread Co. vs. Williamantic Linen Co.*, 140 U. S. 481, 489; *Thayer vs. Hart*, 20 Fed. 63; *Wheaton vs. Kendall*, 85 Fed. 666, 672; *D. T. Register Co. vs. Bundy Co.*, (C. C. A. Second Circuit), 178 Fed. 812, 818; *Michigan Central R. Co. vs. Cons. Car. Heating Co.*, (C. C. A., Sixth Circuit), 67 Fed. 121, 129; *Columbia Chain Co. vs. Standard Chain Co.* (C. C. A., Sixth Circuit), 148 Fed. 622, 629; *New England Motor Co. vs. B. F. Sturtevant Co.* (C. C. A., Second Circuit), 150 Fed. 131, 137; *Charles Hunnicutt vs. Gaston Co.* (C. C. A. Third Circuit), 218 Fed. 176; *Cons. Ry. etc. Co. vs. Adams & Westlake Co.* (C. C. A. Seventh Circuit), 161 Fed. 343, 350, assumed the burden of carryback the date of the alleged invention by Dunkley to a point anterior to the date of the application for said letters patent and also the date of the said invention by Grier. Three witnesses were presented for this purpose, to wit, S. J. Dunkley, the alleged in-



ventor, and Melville E. Dunkley, his son, each being executive officers of said plaintiff, and Harvey C. Schau, who for many years had been an employee of the Dunkley Company. The essential and outstanding features of the testimony adduced to this end were as follows (references are to the record on appeal in said cases):

1. S. J. Dunkley, in August, 1902, conceived the idea of a peach peeling machine, and explained it to his son Melville Dunkley and gave him instructions as to how it should be built (S. F. Rec. 415-6, 479).

2. A model or experimental machine was built during the fall of 1902, at South Haven, and there tried out on late peaches (S. F. Rec. 434-5, 416, 510, 418, 483, 495). The framework of this machine was introduced in evidence as Plaintiff's Exhibit 10.

3. A lye tank for this machine was made by the Clark Engine & Boiler Company of Kalamazoo, and delivered in April, 1903 (S. F. Rec. 418, 438). The complete machine, consisting of a brush machine (Ex. 10) and the lye tank attached, was set up at South Haven and tried out on early Georgia peaches in July, 1903 (S. F. Rec. 418, 479-70, 510-1).

4. In the late summer or early fall of 1903, a second machine was built, to wit, a three-line, wooden frame commercial machine (S. F. Rec. 488, 446). (The model machine was a one-line, wooden frame machine.) This three-line commercial machine was completed either in July, 1903 (S. F. Rec. 482-3), or August or September, 1903 (S. F. Rec.

446). This machine also was built at South Haven (S. F. Rec. 446).

5. This second machine was used on an extensive commercial scale in peeling peaches at South Haven in 1903, and on some days, the receipt of peaches was so heavy that both machines, to wit, the model or experimental machine and the three-line machine, were used (S. F. Rec. 488). 75% of the peaches peeled at South Haven in 1903 was peeled by these machines (S. F. Rec. 425).

6. Only two machines, namely, the wooden frame, experimental or model machine, and the three-line, wooden frame, commercial machine, were built prior to November 1, 1904 (S. F. Rec. 449, 500-1). Following these wooden frame machines, iron frame machines were built, as it was found that the lye destroyed the wooden framework (S. F. Rec. 417).

7. Testimony given by S. J. Dunkley and Melville E. Dunkley in 1910 in an interference proceeding, to the effect that the said model or experimental machine (Ex. 10) was built in July, 1903, was explained away by Melville E. Dunkley in this way: The only record in the possession of the plaintiff (S. F. Rec. 444-5) was a letter from the Clark Engine & Boiler Co. dated April 21, 1903 (S. F. Rec. 741), referring to an invoice for a galvanized tank. The tank referred to in the invoice was the tank for the first experimental machine (S. C. Rec. 467). This Clark letter referring to this invoice for the tank enabled Melville E. Dunkley to remember and say that the experimental or model machine was built in 1902 instead of in July, 1903, as testified to

in 1910 in the interference proceeding (S. F. Rec. 465, 463-8).

8. This so-called Clark letter was the only documentary evidence that plaintiff was able to produce. All records of the Dunkley Company which were not lost or destroyed in connection with the bankruptcy of the Company in 1908, were at South Haven and were destroyed when the cannery there was burned in 1912 (S. F. Rec. 444-5).

The importance and materiality of this fact and of the said Clark letter were pressed before this Court by counsel for the plaintiff in the following language:

“Since then they have unearthed the Clark letter of April 21, 1903, showing that the lye tank was built in April, 1903, and this letter refreshed their recollection of the transaction so as to enable them to now state that the framework and spray part of the machine had been built before the lye tank, and in following the matter back they now recollect that the framework and spray part were built in 1902. Until this Clark letter was unearthed, the Dunkleys were not sure in their recollection that the framework was built in 1902, although they were sure that it was in existence as early as July, 1903; therefore in the Patent Office proceedings they were justified in fixing the date at least as early as July, 1903. But the Clark letter changed the situation somewhat and proved to them that the lye tank was built in April, 1903, and as the spray part was built and tested with-

out the lye tank, it necessarily was built before April, 1903. In other words, the production of the Clark letter enabled the Dunkleys to remember that the spray part of the machine was built in 1902, and that a complete machine was installed with a lye tank added in July, 1903.” (Reply Brief of Appellee on appeal, S. F. case, pp. 55-6.)

And further:

“Another criticism made against the Dunkleys is that they produced no written records. But counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912 the Dunkley cannery was destroyed by fire and their records were lost.” (Reply Brief of Appellee on appeal, p. 59.)

9. In 1903 very little hand peeling of peaches was done at South Haven (S. F. Rec. 425-6). What was done was by women sitting about small tables just as in 1902 (S. F. Rec. 425-6). There were ten or fifteen or twenty of them (S. F. Rec. 426). There was no long-hand peeling table, along each side of which women sat peeling peaches in 1903. This table was an inspection table and was not installed until 1904 (S. F. Rec. 443, 452, 454).

(c) The defendants in said cases in surrebuttal, offered three witnesses as to the said dates of the Dunkley conception and reduction to practice, to wit, Stewart Campbell, William Bruncker and E. B. Mapes. Campbell testified to the building of the model or experimental machine in the fall of 1903 at



South Haven, and the three-line commercial machine in the winter of 1903-4 at Kalamazoo. His testimony, however, was rejected both in the District Court and upon appeal in this Court. Mapes, who ran a small machine shop in South Haven, produced his original account book which was introduced in evidence and which contained the following entries:

1903 Dunkley Canning Factory (Page 77)

Sept. 28,	To 2 iron pulleys for peach washer . . .	2.00
28,	6 hours' time on peach machine . . . .	2.40
29,	6 hours' time on peach machine . . . .	2.40
	2 lbs. babbit . . . . .	.40
30,	6½ hours' time on peach machine . . . .	2.60
Oct. 1,	11½ hours' time 2 ¾ set screws . . . .	.70
	1, Bore, 2 Pulleys . . . . .	.60
	3, Cutting Shafting, 1 hour . . . . .	.40
	5, 3 hours' time . . . . .	1.20

Dunkley Canning Co. (Page 87)

Oct. 6,	Mapes time on friction 8 hours . . . .	3.20
	Leather for friction . . . . .	1.00

He testified that he saw a machine in the Dunkley factory in October, 1903, but did not identify any particular machine.

Brunker (who worked at the Dunkley South Haven cannery in 1903 only, commencing work there the latter part of June and continuing for four or five months, and leaving by the last boat for Chicago) testified to helping Campbell work on a peach machine, but did not identify any particular machine. The entries in the account-book of Mapes and his testimony in explanation thereof and that of Brunker were apparently considered referable



to some machine other than the model or experimental machine and hence as not being inconsistent with the testimony of the two Dunkleys.

IV. *Newly discovered evidence.*

During the course of the trial of said case of *Michigan Canning & Machinery Co. and Dunkley Company vs. Pasadena Canning Co. et al.*, in the United States District Court for the Southern District of California, Southern Division, herein sometimes designated District Court at Los Angeles, which trial commenced on May 21, 1918, and continued until July 2, 1918, there came to the knowledge of your petitioner, and your petitioner discovered, new and additional evidence bearing upon the dates of the said Dunkley conception and reduction to practice, of an irrefutable character, which could not by the exercise of due or any possible diligence have been discovered or secured prior thereto, which said evidence and its materiality is as follows:

(a) In the trial of said case, and before the witnesses were offered on behalf of the defendants therein, Melville E. Dunkley was further cross-examined by the defendants therein as to the testimony given by him in said cases tried in the District Court of the United States for the Northern District of California, Southern Division, Second Division (herein sometimes designated District Court at San Francisco), and particularly in regard to his said testimony in respect to the so-called Clark letter and invoice referred to therein, being the matter referred to in subdivision 7 under sub-

division (b) of paragraph III hereof. Referring to said invoice, he testified as follows (References are to the record on appeal in said case tried in the District Court at Los Angeles):

“I am not just sure on the details of that tank, and I am not just sure of that invoice.

“Q. Oh, you are not?”

“A. No, sir. That invoice brought the proposition up as to the general details just about the time that tank was purchased and I am quite sure that that covered the tank. It might, however, have covered other items.

“Q. And it might have been something else entirely than that tank, might it?”

“A. Oh, it might have; yes, sir.” (L. A. Rec. 1058.)”

Again:

“Q. You still think that this galvanized tank, as it is described in that invoice you were just looking at, is the tank that was the lye tank used at the South Haven factory?”

“A. I am not sure that is the galvanized tank.” (L. A. Rec. 1291.)

(Subsequently in the course of said trial and by testimony to which reference will hereinafter be made, it was definitely proven by witnesses offered by defendants, that said invoice covered not a lye tank, but a soup tank built for the Dunkley Co. and was installed, not at South Haven, but at its Kalamazoo factory. Counsel for plaintiff in said case abandoned all claim that said letter and the

invoice referred to therein covered or referred to said lye tank.)

The materiality and importance of this testimony lies in the fact that it eliminates the only documentary proof or evidence adduced in said cases in the United States District Court at San Francisco, bearing upon the date of the construction of said model or experimental machine, as testified to by witnesses offered by plaintiff therein, and also because it eliminates the excuse or explanation there made by Melville E. Dunkley for changing his testimony given in said Interference case as to the date of the construction of said model or experimental machine from July, 1903, to the fall of 1902.

(b) In the trial of said case, before witnesses were offered on behalf of defendants therein, Melville E. Dunkley was further cross-examined by the defendants therein, as to testimony given by him in said cases in the said District Court at San Francisco, and particularly in regard to his said testimony in respect to the loss and destruction of the books and records of the Dunkley Company, being the matter referred to in subdivision 8 under subdivision (b) of paragraph III hereof. After the following testimony given by the witness at the said trial at San Francisco was read to him,

“Q. Have you no records whatever showing the purchase of any parts for this first experimental model machine or the first commercial machine?

“A. The only record we have at the present time on this first machine covers the purchase of the first simple experimental tank that was built, that was used with this in 1903; otherwise we have practically no records left. What few records were left were at South Haven covering the transactions of the factory work at South Haven, and were burned when we had a complete fire loss in 1912.” (S. F. Rec. 445; L. A Rec. 1399.)

he was asked and testified as follows:

“Q. Do you recall giving that testimony?

“A. Yes, sir.

\* \* \* \* \*

“Q. Did you mean by this testimony to say that any part of the books or records containing any record evidence relating to the model experimental tank, or the building of it, had been burned or destroyed in the fire of 1912?

\* \* \* \* \*

“A. I think I testified the other day that the South Haven factory stood months idle from the bankruptcy, until the time of the fire. Whatever records were in the South Haven factory at that time, so far as I knew, were either destroyed by fire or carried away by hand. The balance of the records I have no idea where they went to.

“Q. Do you say that there was any book or any record in the South Haven factory at the time of the fire, which contained any written evidence whatsoever relating to the making of



the model experimental machine, or relating to the making of the first commercial machine?

\* \* \* \* \*

“A. I think that last answer will cover that also.

\* \* \* \* \*

“Q. I think I will have to ask you to say yes or no. I am not asking what is in them now. I ask you if you mean to say that you know that there was in that factory at the time it was burned any book or record that contained any evidence relating to the time of building, or the material that went into the experimental model machine, or the first commercial machine.

\* \* \* \* \*

“The COURT.—I would like to have that testimony explained, what he meant in the San Francisco case. The objection will be overruled.

\* \* \* \* \*

“A. Why, I wasn't there when that fire started. I don't see how I could be expected to say that I knew anything was in there. I hadn't been around there for a couple of years previous to that fire.

“Q. Then you didn't mean to say that you knew there was any book or record in there in the San Francisco trial?

\* \* \* \* \*

“A. No, sir; I don't think I did so say.



“Q. At any rate, if you did say so, you didn’t mean to say that you did?

“A. No, sir.” (L. A. Rec. 1399–1402.)

There was also offered in evidence during the trial of said case, a stipulation as follows:

“It is hereby stipulated by the plaintiff that all books, papers and records of the Dunkley Company, which was an Illinois corporation operating at South Haven and Kalamazoo, Michigan, covering the period from 1901 to 1908 were turned over to H. C. Briggs as referee in bankruptcy when such corporation was adjudged a bankrupt in 1908, and were, by the said Briggs, turned over to James Grant as trustee for creditors in said bankruptcy proceedings, and thereafter, to wit, in January, 1910, by the said Grant turned over to the Dunkley Company, a Michigan corporation, the plaintiff herein.” (L. A. Rec. 1206.)

S. J. Dunkley, on being cross-examined in said case and upon the same subject matter, testified as follows:

“Q. Do you mean to say you destroyed the books of 1903?

“A. No, sir.

\* \* \* \* \*

“Q. Do you mean to say you destroyed the books of 1904?

“A. No, sir.

“Q. Do you mean to say you destroyed the books of 1905?

“A. No, sir.” (L. A. Rec. 1557–8.)

The materiality and importance of this evidence and testimony lies in the fact that it eliminates the excuse and explanation made by the plaintiff in said cases in the said District Court at San Francisco, for the nonproduction of the books, papers and records of the Dunkley Company showing the purchase of lye for the lye machine and of parts for the said lye machine, and for relying upon the unsupported and uncorroborated memory testimony of the two Dunkleys and a former employee, to carry back the date of the construction of the first Dunkley machine to a point anterior to the date testified to by the two Dunkleys in said Interference proceeding, and a date anterior to the date on which Grier constructed his two commercial machines.

(c) In the trial of said case, before witnesses were offered on behalf of defendants therein, Melville E. Dunkley was further cross-examined by the defendants therein as to testimony given by him in said cases in said District Court at San Francisco, and particularly in regard to his said testimony that there was no long-hand peeling table, along each side of which women sat peeling peaches by hand in 1903, being the matter referred to in subdivision 9 under subdivision (b) in paragraph III hereof, and he testified as follows:

“Q. When you testified in San Francisco, did you not mean to have the court understand there that there was no long table installed in the factory in 1903—

“The COURT.—Now stop there.

“Q. I wanted to add, at which women pitted and peeled peaches while sitting on a platform.

“A. I don’t think I meant to infer that at all, but my mind was upon the machine which was—or the inspection table and the filling table, which was there in 1904. (L. A. Rec. 1274.)

\* \* \* \* \*

“Q. Your construction of that is that you did not mean to say that there was no such table there in 1903. Is that correct?

“A. I think that is more or less correct. At the time that I was testifying here I had in mind the table that was used in connection with the peach pitters in 1904. (L. A. Rec. 1251.)

\* \* \* \* \*

“Q. Was it continued to be as long in 1904 as it was in 1903?

“A. No, it was not.

“Q. What was done to it? Had it been cut in half?

“A. Both parts of that table were cut in half in 1904, both the part with the conveyor belt in the middle and the slat filling part was cut in two, with an idea of installing two lines with the peelers.” (L. A. Rec. 1073.)

\* \* \* \* \*

“Q. Now in this peach season of 1903; was that table full of women from one end to the other, on both sides, peeling peaches and pitting them by hand?

“A. I should say yes, sir. I don’t remember

that it was not; that is what it was put in there for. I don't doubt but what it was."  
(L. A. Rec. 1072.)

S. J. Dunkley, being cross-examined in said case and upon the same subject matter, testified as follows:

"Q. So you don't think the syringing table was in line with the long table—the 150-foot table?

"A. No.

"Q. Was the filling table in line with it?

"A. I don't remember. Having a pear cooker—

"Q. Well, without taking into consideration the pear cooker, now, was the filling table in line with the long table in 1903—the 150-foot table?

"A. Yes, I think it was.

"Q. How long was the filling table in 1903?

"A. Sixty feet.

"Q. Then the long table that had a conveyor belt over it in the peach season of 1903 was 150 feet long?

"A. As nearly as I can remember.

"Q. And it had a platform on each side of it that was about how wide?

"A. It was wide enough for the women to get up and sit, with a basket of peaches sitting next to them.

"Q. So that the chair could set on it ?

"A. Yes.

"Q. And how wide was that long table?



“A. Well, I should say the conveyor belt was 10 or 12 inches, and the pan would be 16 to—or the place where they set the pans down would be 16 to 18 on each side of the conveyor to set a chair on and hold the basket of peaches.” (L. A. Rec. 1519–20.)

He further testified that his memory as to the long table was refreshed by reading the deposition of one Miller taken in said case in which Miller exhibited his books showing he had sold 300 feet of tin to the Dunkley Company in July or August, 1903 (L. A. Rec. 1448–9). This was used to make a trough on each side of the long table. He further testified that the main factory-room was 32 feet wide (L. A. Rec. 1518–9) and 220 feet long (L. A. Rec. 1503), and that the long table and the filler table in 1903 were located along the south side of the room (L. A. Rec. 1531).

(Subsequently in the course of said trial, and by testimony to which reference will hereinafter be made, the exact date and circumstances of the construction of this long table and its use during 1903, and that substantially all peaches in 1903 were peeled by hand or by little hand machines by women sitting along this table, and that there was no commercial use of a lye peach peeling machine in 1903 were definitely proven by testimony, both oral and documentary, offered by defendants.)

The materiality and importance of this Dunkley testimony lies in the fact that, to use the language of Judge Trippet in deciding the said case before him,



“The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of the plaintiffs’ case,”

in that the construction of this long table just prior to the opening of the peach season of 1903 and at or about the time at which it was testified that the three-line commercial machine was being built, and the use of this long table during the 1903 season, involving as it did the installation and use of a new and improved system, is repugnant to the idea that at the same time lye peeling machines were being constructed and were installed in the very same room and put into extensive commercial use, and that 75% of the peaches in that season were peeled by these machines and that the only hand peeling done was by women sitting about small tables just as in 1902 and that there were but ten or fifteen or twenty of these women.

(d) In the trial of said case, toward the close thereof and when S. J. Dunkley was being examined as a witness on behalf of the plaintiffs therein, he produced, for the purpose of refreshing his recollection, certain correspondence which had passed between himself and Mr. Edwin Norton and Mr. O. W. Norton, who were the financial backers of the Dunkley Company (L. A. Rec. 4063). The letters embraced in this correspondence, he there testified, were “dug up out of the cellar” (L. A. Rec. 4182) by a Mr. Verhage (who was an employee of the Dunkley Co.). The particular letters produced, according to the testimony of the said Dunk-

ley there given, were taken "from stacks of them" including everything "from 1901 on" (L. A. Rec. 4076). All of the letters embraced in this correspondence were by the defendants therein promptly introduced in evidence (L. A. Rec. 4099). They appear copied at length in the record on appeal to this Court in said case, which record is in the files of this Court, and to which record reference is hereby made for a complete transcript of said letters, and the same is made a part hereof to the same effect as if herein set out at length.

The materiality and importance of this correspondence lies in the fact that it established:

1. That the second machine built, to wit, the three-line, wooden-frame, commercial machine, was built, not at South Haven, but at Kalamazoo, and was built after the closing up of the cannery at South Haven, which closing was at least as early as October 29, 1903, and was shipped to South Haven in March or early in April, 1904, and was thereupon set up in the South Haven factory and was used for the first time during the peach season of 1904.

2. That there was no use made of a lye peeling machine on a commercial scale during the 1903 season.

3. That in the 1904 peach season, the use of a lye peeling machine was considered as something new and experimental.

4. That the original entries in the account-book of E. B. Mapes, hereinbefore referred to, and which showed work on a peach washer or peach machine

in September and early in October, 1903, and his testimony in respect thereto and the said testimony of Brunker must have had reference to work on the model or experimental machine, as the three-line commercial machine was not built at South Haven and had not been started at the date of these entries or during the time Brunker was at South Haven, and as the model or experimental machine was the only other machine there was to which said entries and testimony could have referred.

(e) Subsequent to the trial and determination of said case in said United States District Court at Los Angeles, there was tried in the United States District Court for the Southern District of New York, a case between the Dunkley Company, the respondent herein, and the California Packing Corporation, involving, among other issues, the issue of priority as between the alleged Dunkley invention and the said invention of Grier, and in which case all the evidence presented at the trial in said District Court at San Francisco, and all the evidence presented in the case tried in the said District Court at Los Angeles was presented, during the course of which said trial your petitioner discovered certain new and additional evidence which could not, by the exercise of due or any possible diligence, have been discovered or secured prior to June, 1918, in this, that certain additional evidence was there presented by said Dunkley Company, included in which were the payrolls of the Dunkley Company for its South Haven cannery for the seasons of 1902, 1903 and 1904. Said payrolls show

the relative number of piece workers and time workers in the respective years to have been as follows, to wit:

	1902	1903	1904
Piece Workers (hand peelers)....	70	80	12
Time Workers .....	121	75	216

Said payrolls and the evidence identifying and explaining the same are a part of the record on appeal taken by the petitioner and the other defendants in said cases tried in the said District Court at San Francisco, from the order granting the motion of the plaintiff therein, and referred to more particularly in paragraph II hereof, to which said record reference is hereby made.

The materiality and importance of this testimony lies in the fact that it is inconsistent with the said testimony offered on behalf of the plaintiff in said cases tried in said District Court at San Francisco, to the effect that 75% of the 1903 pack was peeled by lye machine, and that there were but ten or fifteen or twenty women peeling peaches by hand in 1903, since if this testimony had been correct, the drop in the number of piece workers would have occurred in 1903 instead of in 1904.

(f) Subsequent to the trial and determination of said case in the United States District Court at Los Angeles, your petitioner discovered a file of the issues of the "Weekly Tribune-Messenger" of South Haven, for the year 1904, which said paper was a weekly edition of the "South Haven Daily Tribune." (The circumstances of the discovery of this file and that it could not have been earlier dis-



covered by due or any diligence are more particularly referred to hereinafter.) In said "Weekly Tribune-Messenger" of April 22, 1904, there appeared the following article:

**"IMPROVEMENTS TO CANNING FACTORY.**

(From Tuesday's Daily.)

"The Dunkley Company is making extensive improvements at the canning factory in preparations for this season's business. A low shed 16 feet wide is being built along the south side next the railroad, nearly 200 feet long, to be used for storing empty cases. A similar shed, not quite as long, will be built along the north side for a cold-storage room, and a new boiler room will be built at the west.

"Inside important changes are being made in the machinery, which is under the direction of Stewart Campbell, the superintendent, who is inventor of two new machines to be used for the first time this season: a pitting machine and a paring machine. Two of each will be put in, as they are building an additional paring table 110 feet long. Mr. Campbell has also about perfected a sorting machine which is said to be more wonderful even than the pitting machine.

"Also another vacuum canning machine will be installed so that the capacity of the factory will be very materially increased. The company will be prepared this year to handle a larger quantity of fruit than ever before."

No denial or correction of this article appears in any subsequent issue of said paper. The article was written by L. L. Crosthwaite, now and for some



time hitherto a resident of Chicago, Ill., whose best recollection is that the information upon which the article was based was given to him by S. J. Dunkley, all of which more fully appears from the affidavits of said L. L. Crosthwaite in the record on appeal taken by the petitioner and the other defendants in said cases in the said District Court at San Francisco, from the order granting the motion of the plaintiff therein, and referred to more particularly in paragraph II hereof, to which said record, and particularly the portion thereof containing the affidavits of said L. L. Crosthwaite, reference is hereby made to the same effect as if said affidavits were herein set out at length.

The materiality and importance of this evidence and testimony lies in the fact that it establishes that the use of a lye peeling machine at the Dunkley factory at South Haven was new in the year 1904, and that there had not been any commercial use of a lye peeling machine at said factory during the 1903 season.

(g) Subsequent to the trial and determination of said case in the United States District Court at Los Angeles, and in or about the month of December, 1918, your petitioner discovered that Mr. Arthur W. Norton, of Baltimore, Md., now Vice-president of the Continental Can Co., the son of Edwin Norton, deceased, who was a stockholder in and the financial backer of the old Dunkley Company, and being the "Arthur" referred to in that certain letter of October 23, 1903, from Edwin Norton to S. J. Dunkley, one of the letters embraced in

the correspondence referred to in subdivision (d) of this paragraph, and who was at the South Haven factory of the Dunkley Company during the 1903 and 1904 peach seasons as the representative of his father, by reason and as a result of reading said correspondence referred to in said subdivision (d) of this paragraph, was enabled to remember the facts to be and to testify that the peeling machine referred to in said letter of October 23, 1903, was a model or experimental machine which was built at South Haven during the fall of 1903 and tried out on a few late peaches that year, and that there was no commercial lye peeling of peaches during the 1903 season, and that during the winter of 1903-4 there was constructed a second machine, to wit, a three-line, wooden-frame, commercial machine, and that this machine was installed in the factory at South Haven before the opening of the 1904 season and was used extensively during the 1904 season, and that this was the first time there was any commercial use of the lye-peeling machine at the South Haven factory of the Dunkley Company. The affidavits of said Arthur W. Norton to these and other facts appear in the record on appeal taken by petitioner and the other defendants in said cases in the United States District Court at San Francisco, from the order granting the motion of the plaintiff therein, and referred to more particularly in paragraph II hereof, to which said record and particularly the portions thereof containing the affidavits of said Arthur W. Norton, reference is hereby made and the same is made a part hereof, to the

same effect as if said affidavits were herein set out at length.

The materiality and importance of this evidence lies in the fact that it establishes the date of the construction of the Dunkley model machine to have been the autumn of 1903, the date of the construction of the three-line, commercial machine to have been the winter of 1903-4, and that there was no commercial use of a lye peeling machine until 1904.

(h) Said testimony of S. J. Dunkley and Melville E. Dunkley, as set forth in subdivisions (a), (b) and (c) of this paragraph, and of said S. J. Dunkley in regard to said Dunkley-Norton correspondence, as set forth in subdivision (d) hereof, is but a part of the testimony of said witnesses given in said case tried at Los Angeles. The full testimony of said witnesses there appears in the record of said case on appeal in this Court, to which said record reference is made for said testimony so specifically referred to, as well as to all of the testimony of said witnesses in said case, to the same effect as if all of said testimony of said witnesses was here set forth at length.

(i) Melville E. Dunkley and S. J. Dunkley are now, and at all times since long prior to 1916, have been directors and executive officers of said Michigan Canning & Machinery Company, and are now and at all times since the organization of said new Dunkley Company, have been such officers of said new company.

V. *Circumstances of discovery of new matter—  
Diligence.*

(a) Referring to the new matter set forth in subdivision (f) of paragraph IV hereof, the petitioner alleges that said newspaper article was discovered under the following circumstances:

On or about January 18, 1919, Mr. Kemper B. Campbell, one of the attorneys of petitioner, received a letter from Mr. Bert McFarland, of South Haven, Michigan, stating that he had discovered a file of the "South Haven Tribune-Messenger" for the year 1904 in which appeared the article referred to. Thereupon the said Campbell immediately wired Mr. Frank H. Smiley, of Chicago, advising him of this fact and instructing him to go at once to South Haven and investigate the same. Thereupon the said Smiley went to South Haven, but it developed that said file was not in the possession of the said McFarland, but that he had been permitted to see one in the possession of another person there. Further investigation by the said Smiley unearthed the location of said file, and he was allowed to examine the same, but not to take it from the possession of the person having the same. Thereafter such arrangements were made that the custodian of such file took the same to Chicago where the said L. L. Crosthwaite resided and where the said Crosthwaite was permitted to examine the said file.

Petitioner has never been able to ascertain from whence said file was secured by said person at South Haven. During the course of the prepara-



tion of the trial of said case of *Michigan Canning & Machinery Co. et al. vs. Pasadena Canning Co. et al.*, in the said District Court at Los Angeles, and subsequently, said Campbell caused diligent search to be made for a 1904 file of said "Tribune-Messenger" or of said "Daily Tribune," and caused inquiries to be made at the Public Libraries at South Haven and at Kalamazoo and at the State Capital of Michigan, and at the newspaper offices at South Haven, and of all persons accustomed to keep back numbers of local papers, but notwithstanding said careful search and investigation, no complete file of either of said papers, nor the issues of either of said papers in which said article referred to appeared, could be found or were at any of such places, all of which more fully appears from the affidavits of the said Campbell which appear in full in the said record on appeal to this Court from the order of said District Court at San Francisco, granting said motion of plaintiff for an addition of a party plaintiff, to which said record reference is hereby made for said affidavits and to the same effect as if said affidavits were herein set forth at length.

(b) Referring to the new matter set forth in subdivision (g) of paragraph IV, the petitioner alleges that said Arthur W. Norton was interviewed by Mr. Kemper B. Campbell in or about the month of February, 1918. At that time he stated to the said Campbell that his memory was not clear as to the dates of various occurrences at the South Haven cannery of the Dunkley Company, and that



his testimony, because of the state of his memory, would not throw any light on the controversy between the said parties to the case at Los Angeles, as to the dates of the alleged Dunkley invention. Subsequently, to wit, in or about the month of November, 1918, at Baltimore, Maryland, the attention of the said Arthur W. Norton was called by Francis J. Heney to said letters passing between S. J. Dunkley on the one side, and Edwin Norton and O. W. Norton on the other, and he was asked if he would be willing to read these letters. Thereafter he stated to the said Francis J. Heney that he had read the letters, and that as a result thereof the sequence of events occurring at South Haven had become clear to him, and that he was then able and willing to testify to certain facts which were subsequently, to wit, on December 6, 1918, and February 10, 1919, expressed in the affidavits referred to in subdivision (g) of paragraph IV hereof.

*VI. Effect of new matter.*

That the said testimony offered by the plaintiff in said cases tried in the District Court at San Francisco, when considered in connection with the subsequent substantial and vital changes in testimony by the two Dunkleys, and the facts disclosed by said Dunkley-Norton letters and said newspaper article of April 22, 1904, and the said testimony of Crosthwaite in respect thereof, and said payrolls, and said testimony of Arthur W. Norton, is "not direct and strong," but on the contrary, is "weak and uncertain," and is not of a satisfactory or convincing character, and, petitioner is advised, is

clearly insufficient, as a matter of law, to carry back the date of the alleged Dunkley invention to a point anterior to the established date of the Grier invention. Furthermore, if the rule of *falsus in uno, falsus in omnibus*, applied by this Court to the testimony of Stewart Campbell in affirming on appeal the judgment of said District Court at San Francisco, be applied in like manner to the said testimony of the two Dunkleys, the entire testimony of the two Dunkleys must be rejected, leaving no proofs to carry back the said date of the alleged Dunkley invention to a point anterior to the date of the Grier invention.

VII. *Additional new matter.*

At the trial of the said case of *Michigan Canning & Machinery Co. et al.* vs. *Pasadena Canning Co. et al.*, in said District Court at Los Angeles, there was presented by the defendants therein a large amount of additional and newly discovered evidence (in addition to the new matters set out in subdivisions (a), (b), (c) and (d) of paragraph IV hereof), bearing upon the date of the said alleged Dunkley invention, of such character, force and cogency that the Honorable Oscar A. Trippet, the trial Judge in said case, was convinced thereby "beyond a reasonable doubt" that the Dunkley model or experimental machine was built, not in the autumn of 1902, but one year later, to wit, in the autumn of 1903, and that the date of the said Dunkley patent could not be carried back beyond the summer of 1903 or to a point anterior to the date of the said Grier invention.

In all about forty witnesses, who did not testify in said trial at San Francisco, testified at the said trial at Los Angeles on the issue of the date of the alleged Dunkley invention. Nearly all of these testified in open court. Nearly every one in authority or who took any considerable part in the activities at the Dunkley factory at South Haven during 1903 and 1904, was produced by the defendant as a witness in said case. A considerable amount of documentary evidence was adduced by said defendants. These witnesses testified in the most minute detail as to what took place at said factory during the 1903 and 1904 canning seasons, so that the trial Judge was enabled to visualize the daily life at the said factory and the developments there from time to time as they occurred.

Among these witnesses were (References are to record on appeal to this Court in said case):

1. *William Triece*, now and for more than thirty-eight years a resident of South Haven (2772), who, about August 20, 1903, installed the electric lights over the long hand peeling table (2773-4) which was built in the summer of 1903, and who repaired, during the 1903 season, the little hand peeling machines used at the long table (2776, 2794), and who, in 1903, but after September, saw the model or experimental machine, and saw it being tried out in the fall of 1903 (2778-81), and who, in 1904, actually had charge of and operated the new first commercial lye peeling machine (2786).

2. *Mrs. George K. Brown* (formerly Prena de Young), now living on a farm at Wayland, Michigan and who worked at the Dunkley cannery at South Haven every year the factory ran until 1904 (she having been married on February 4, 1904) (2505, 2520), and who in 1903 was one of the *inspectresses* who inspected the fruit peeled by hand by the women at the long table (2509), and who testified that there were no peaches peeled commercially by the lye process in 1903 (2571, 2521).

3. *Mrs. Leander Kern* (formerly Verna Hallock), now and for a long time a resident of Kalamazoo, who in 1903 was one of the *inspectresses* at the Dunkley cannery in South Haven (1909) and who testified in detail as to the practical daily operations at the cannery in 1903, and that there was no commercial lye peeling of peaches during that year (1911-2, 1941-4).

4. *Mrs. Charles DePue* (formerly Dena Corby), of Kalamazoo, and who worked at the Dunkley South Haven cannery during the 1903 season and at times acted as an *inspectress* (2689-91), and who testified in detail as to the operations at the long table, and that there was no commercial lye peeling of peaches in 1903 (2696).

5. *Mrs. Nellie Weed*, 6. *Mrs. Frank Webb*, 7. *Mrs. Mary Stafford*, each an old-time resident of South Haven, and each of whom worked at the Dunkley South Haven cannery peeling peaches during the 1903 season only (2031, 2039, 1997, 2007, 2213, 2214-5), and each of whom testified there was



no commercial lye peeling of peaches during that year (2036-7, 2003-5, 2227, 2220).

8. *Bert McFarland*, now and for over thirty years a resident of South Haven (2837), and who was employed in the Dunkley cannery at South Haven in the peach peeling department in the season of 1903 (2837-8), and who in that season widened the platform on each side of the long table (2840), and who testified as to the absence of any commercial lye peeling machine during that season (2841), and who saw the model machine in course of construction in the fall of 1903 (2840-1), and who also worked at the cannery in 1904, and who saw the first commercial machine which was newly installed that year (2843).

9. *George K. Brown*, now a farmer at Wayland, Michigan, near Kalamazoo (2441), a former factory superintendent for the Dunkley Co. (2471), who was employed at the Dunkley South Haven cannery in 1903 (2447), and who saw the model machine being built about September, 1903 (2459-60, 2463-4), saw it tested out in the latter part of October, 1903 (2467), and who testified that no peaches were peeled commercially by lye during 1903 (2473); who, before going to South Haven in 1903, was employed at the Kalamazoo plant of the Dunkley Company (2447), and there saw a soup tank (2451-4, 2473) which was the tank covered by the invoice of the Clark Engine & Boiler Co., and referred to in said letter commonly referred to herein as the Clark letter; who before taking over the superintendency of the Hartford plant in 1904,



was at South Haven and saw the new, three-line, wooden-frame commercial machine being installed (2468).

10. *Martin DeLoof*, now a business man at Kalamazoo, who kept books for the Dunkley Co. in 1903, and had charge of the payrolls of the Company at the South Haven cannery (1165); who had a bedroom at the cannery just off the main room (1177), and who passed through the main room daily going between his bedroom and the office (1177), and who testified there was no commercial lye peeling of peaches during the 1903 season (1178), and that the first commercial lye peeling of peaches was in 1904 (1183 *et seq.*).

11. *Ab. Vanderbrook*, now a resident of Perrysburg, Ohio, who had charge of receiving fruit at the Dunkley South Haven cannery during the 1903 season (2739), and who testified that peaches, during that season, were peeled by hand and not by the lye process (2744), and that the use of the lye process started for the first time in the season of 1904 (2745).

12. *S. Van Nostrand*, for twenty-five years a druggist at South Haven and a resident of that town for over fifty years (2327-8), who was an old-time friend of S. J. Dunkley (2328), and who discussed with him the peeling of peaches by the lye process, and was interrogated by Dunkley regarding cylindrical brushes, and who furnished Dunkley with small quantities of lye suitable for experiments (2346-8), his books showing the sales all in the year 1903 (2340-2), and ho testified to

seeing the model machine, but without any lye tank, in the basement about October 20, 1903 (2332, 2335-6, 2352-3).

13. *George Myhan*, former Postmaster of South Haven, and a resident of that place for over fifty years (2102-3), who was a fruit buyer for the Dunkley Company, and who saw the experimental model machine in the basement of the Dunkley cannery at South Haven in the fall of 1903 (2106-8, 2133), and who testified peaches were not peeled commercially by lye during the 1903 season (2111), and that the first commercial use of the lye peeling machine was in the season of 1904 (2108, 2112).

14. *L. L. Corsthwaite*, now employed on the Chicago News, but in 1903 and 1904 connected with the "South Haven Tribune-Messenger," as a reporter (3182), and who wrote a long article for the "Tribune-Messenger" which appeared in the issue of October 1, 1903, describing in detail the progress of peaches from the orchard to the warehouse, and the methods employed in peeling and packing same at the Dunkley cannery (3182-3), and who, refreshing his memory by this article, testified positively there was no lye peeling machine being used in the factory in 1903 (3189-90).

15. *C. R. Newton*, since 1902 a resident of South Haven (2815), who was employed at the Dunkley cannery at South Haven as a syruper at the west end of the peeling room in 1903 (2817, 2816), and who testified that no peaches were peeled commercially by the lye process that year (2819-20),

but that the use of the lye process commenced in 1904, during which year he was also employed at the cannery in the same capacity (2823), and who in 1903 saw in the basement a machine that looked like the framework of the model or experimental machine (2821-2).

16. *Mrs. Eleanor Moore*, now head of the dry-goods department of Hale's Department Store at South Haven (2869), who was employed at the filling table at the end of the long peeling table at the Dunkley South Haven cannery in 1903 (2851), and who testified there were no peaches peeled by lye during 1903 (2854), but that the use of the lye process started in 1904 (2855-6).

17. *Robert Newton*, son of C. R. Newton, now a resident of Kalamazoo (2368), and who worked in various capacities in the Dunkley South Haven factory in 1903 (2371), and who testified that no peaches were peeled commercially by lye in 1903 (2377), and who saw the first experimental model machine being built in the basement of the factory in the fall of 1903 (2377-85).

18. *Mrs. Ed Kreuger*, who has lived at South Haven since 1893 (2172) and who worked at the long hand peeling table at the Dunkley South Haven cannery during the 1903 season (2175), and who testified there was no lye peeling of peaches during 1903 (2183-4), but that in 1904, during which year she also worked at the Dunkley South Haven cannery, she inspected lye peeled peaches (2186-7).

19. *George Harold*, now and for a long time a resident of South Haven and vicinity (2662), who

was employed at the Dunkley South Haven cannery in 1904 (2662), and who assisted in installing water pipes for the new three-line commercial machine which was being installed in June and July, of that year (2664-7).

20. *Mrs. George Harold*, now and for a long time a resident of South Haven and vicinity (2072), who peeled peaches at the long hand peeling table in 1903 (2076), and who part of that time acted as an *inspectress* (2077), and who was an *inspectress* practically all of the time during the 1904 season (2081-2), and who testified there was no lye peeling of peaches in 1903 (2080-1), but that the first lye peeling occurred in 1904 (2079).

21. *William H. Riddeford*, a member of the firm of Riddeford Brothers, of Chicago, now and for many years past manufacturers of brushes (1708-9), who identified Stewart Campbell as the man who purchased for the Dunkley Co. of South Haven, from Riddeford Brothers, about August, 1903 (1709), two cylindrical brushes for a machine to be constructed for peeling peaches, and who produced his original books showing the sale and containing a sketch of the brushes ordered from him (1710 *et seq.*).

22. *Nicholas Plating*, for many years a boiler-maker with the Clark Engine & Boiler Co., of Kalamazoo (2600), who made the tank for the Dunkley Co. covered by the invoice of April 20, 1903, which was the invoice referred to by the so-called Clark letter, and who testified that the invoice covered a soup tank which was installed in the Kalamazoo



factory of the Dunkley factory (2601-3, 2609), and not a lye tank, and who also made for the Dunkley Company, a boat-shaped tank which resembled the tank shown in the Dunkley patent drawings (2603, 2607-8).

23. *Louis E. Payne*, a pattern maker of Kalamazoo (3041), who made patterns for Stewart Campbell in the early part of 1904 for a peach peeler and also for a peach grader (3043).

24. *Jacob Hycoop*, of Kalamazoo (3023), who identified the Decker books showing work on a peach peeler for the Dunkley Company in the spring of 1904 (3030-1 *et seq.*), and who remembered doing work on a peach peeler for the Dunkley Co. at the instance of Stewart Campbell (3025-6).

25. *William Decker*, 26, *Dorothy Janashak*, of Kalamazoo, who also identified entries in the Decker books, showing work done on a peach peeler for the Dunkley Co. in the spring of 1904 (253 *et seq.*, 280 *et seq.*).

27. *Fred J. Buckley* and 28, *Thomas Brazill*, who identified records of the Buckley shops in Kalamazoo showing the sale during the early part of 1904 to the Dunkley Company of various castings, etc., and who stated some of these were ordered by Stewart Campbell for a peach peeler.

29. *John F. Noud*, of South Haven, President of the Noud Lumber Co., who identified account-books showing the sale of lumber to the Dunkley Company in July and August, 1903, which was the lumber used for the construction of the long hand peeling table.



30. *John C. Miller*, of South Haven, who furnished 150 feet of trough for the long table in 1903 (2645-6), and whose books show date of such sale, and whose deposition refreshed the memory of S. J. Dunkley so that in the trial of the case at Los Angeles he was able to remember about the long table in 1903 (1448-9).

31. *Robert Clark*, 32, *William Clark*, 33, *Clyde M. Funk*, 34, *Maud Howes*, and 35, *Katherine Breen*, residents of Kalamazoo, who identified books and records of the Clark Engine & Boiler Co. which established that but one lye tank was built by the Clark Company for the Dunkley Company between May, 1902, and September 30, 1904, and that this tank was delivered on January 30, 1904, and was a special tank built according to sketch; the only other tank furnished during that period being the tank covered by the invoice of April 20, 1903, referred to in the so-called Clark letter, and which was proven to be a soup tank (2660-1, 2635).

36. *Leander Kern*, who went through the South Haven factory of the Dunkley Co. in 1909, and who testified there were no books or records there (3073-4).

37. *William C. Spencer*, now and for many years a resident of South Haven, who worked for the Dunkley Co. at its South Haven cannery in 1904 (3060), and who testified that the first commercial lye machine was operating in 1904, and that S. J. Dunkley told him the machine and process were something new and that it was put in that year (3060-1), and who also testified that in 1909 he was

watchman of the Dunkley factory for an insurance company, and that there were no books and records there (3063-5).

38. *William McEwing*, of South Haven, who was an appraiser in the Dunkley Co. bankruptcy matter in 1908, and who testified that there were no books or records at the South Haven factory of said company at that time (2321-3).

39. *Charles DePue*, a resident of Kalamazoo, syrup maker at South Haven factory during season of 1902, 1903 and 1904, who first saw a lye peach peeling machine in the season of 1904 (2553).

40. *August M. Augensen*, now and for many years a mechanical engineer for the American Can Company (2137), who was at the Dunkley cannery at South Haven in 1902 (2138), and who in 1904 was there for a considerable length of time installing in the factory special lines of machinery (2149), and who saw in 1904, a new commercial lye machine being assembled and set up in the factory (2150-3, 2165), and who almost daily at luncheon participated in conversation with Melville E. Dunkley, Arthur W. Norton and others, indicating that the new peeling machine marked the first commercial use of the lye peeling system (2163).

41. *John Hetherington*, expert machinist in the employ of the Cadillac Company of Detroit, Michigan (2875), who was employed by the Dunkley Company at the South Haven cannery in 1904 and 1905 (2875), as a machinist, and who testified that a new commercial machine was installed in 1904 (2885-6), and who superintended the building of the

iron frame machines in the winter of 1904-5 (2892-5).

The full testimony of each of said witnesses referred to in this paragraph, and the documents and records referred to by them in their testimony appear in the record on appeal to this Court in said case, to which said record reference is hereby made for the testimony of said witnesses, and the said testimony of each and said documents and records are hereby referred to and made a part hereof to the same extent as if herein set forth at length. And further reference is hereby made to the affidavits subsequently made by these said several witnesses, as the same appear in said record on appeal to this Court, from said order of the District Court at San Francisco, granting the motion of the plaintiff in said cases for an addition of a party plaintiff, and the said affidavits are hereby made a part hereof to the same extent as if here set forth at length.

The materiality and importance of this evidence lies in the fact that it affirmatively establishes the date of the alleged Dunkley invention to have been subsequent to the date of the Grier invention.

VIII. *Circumstances of discovery of new matter—  
Diligence.*

The circumstances of the discovery of said testimony referred to in paragraph VII hereof are stated in the affidavits which appear in the record on appeal from the said order of said District Court at San Francisco granting the motion of the plaintiff in said cases there for an addition of a party plaintiff, to which said affidavits and particularly to

the affidavit of Kemper B. Campbell and the supplemental affidavit of Kemper B. Campbell, reference is hereby made, and the same are hereby made a part hereof to the same extent as if herein set forth at length, and the reasons why said testimony was not discovered and presented at the trial of said cases in the District Court at San Francisco are stated in said affidavits specifically referred to and also in the said affidavit of William K. White appearing in said record, to which reference is hereby made.

IX. *Decisions on new matter.*

The new matter hereinbefore referred to, except that referred to in subdivisions (e), (f) and (g) of paragraph IV hereof, was before the said District Court at Los Angeles in said case of *Michigan Canning & Machinery Co. et al. vs. Pasadena Canning Co. et al.*, and said Court, after having heard said evidence and after having heard nearly all of the witnesses giving the same testify in open court, considered the same as material and of such a conclusive character as to impel the conclusion beyond a reasonable doubt that the Dunkley first experimental or model machine was not constructed in the autumn of 1902, as testified to by witnesses offered by the plaintiff in said cases tried in the District Court at San Francisco and as found by said Court, but in the autumn of 1903, and that the date of the said alleged Dunkley invention could not be carried back any further than the summer of 1903; and that hence said invention was subsequent in point of time to the invention of said Grier.



Subsequently there was tried in the United States District Court for the Southern District of New York, a case between the Dunkley Company, the respondent herein, and the California Packing Corporation, involving, among other issues, the issue of priority as between the alleged Dunkley invention and the said invention by Grier, and in which case all of the evidence presented in said cases tried in the said District Court at San Francisco and all of the evidence presented in said case tried in said District Court at Los Angeles, and certain additional evidence of a somewhat inconsequential character, except said payrolls of the said Dunkley Company (said additional evidence is set forth at length in the record on appeal to this Court from the said order of the District Court at San Francisco granting the motion of the plaintiff for an addition of a party plaintiff, to which record reference is hereby made for such additional evidence), and in which case said Court reached the same conclusion as did the said District Court at Los Angeles, as to the date of the alleged Dunkley invention.

*X. Equity of the petition.*

It is inequitable and unjust that the decision and decrees of said District Court at San Francisco be allowed to stand as against this petitioner and the other defendants therein, when based upon evidence adduced by the plaintiff therein, which in said subsequent cases has been retracted and changed in essential and material particulars, and when said evidence in its modified and changed form is insufficient in character to carry back the date of the



alleged Dunkley invention to a point anterior to the date of the Grier invention, and when in said subsequent cases it has been affirmatively established that the date of the alleged invention by Dunkley was subsequent to the date of the Grier invention. Petitioner also represents that in the interest of justice and uniformity of judicial decision, the decrees should not be allowed to stand as against the petitioner and said other named defendants in said cases tried in the District Court at San Francisco, when as against all of their competitors in California the patent sustained in said cases is invalid.

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company*, Plaintiff, vs. *Hunt Brothers Company*, Defendant, being Equity Case No. 211 in

said court, and for such other relief as may be appropriate in the premises.

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,  
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition, and is familiar with the contents thereof, and that the facts therein stated are true.

KEMPER B. CAMPBELL,

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal] L. BELLE WEAVER,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Hunt Brothers Company, a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition this 6th day of January,

1922. Fred L. Chappell and W. A. Richardson,  
Counsel for Dunkley Co. and Michigan Canning &  
Mach'y. Co.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

CENTRAL CALIFORNIA CANNERIES, a Cor-  
poration (Sometimes Designated CENTRAL  
CALIFORNIA CANNERIES COMPANY),  
Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning &  
Machinery Company, and to Messrs. Fred L.  
Chappell and W. A. Richardson, Counsel and  
Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY  
NOTIFIED that on February 6, 1922, at the hour  
of 10:30 A. M., or as soon thereafter as counsel  
can be heard, in the courtroom of the above-en-  
titled court in the United States Post Office and  
Courthouse Building in the City and County of  
San Francisco, California, Central California Can-  
neries (sometimes designated Central California  
Canneries Company) will move the Court for an  
order permitting it to file a bill in the nature of a  
bill of review to have reviewed, reversed and set  
aside that certain interlocutory decree made and

entered in the United States District Court for the Northern District of California, Southern Division, Second Division, on December 8, 1916, in the case of *Dunkley Company*, Plaintiff, vs. *Central California Canneries Company*, Defendant, Equity No. 201, and to that end will present the petition for such leave accompanying this notice.

Said Motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Cannery Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER CAMPBELL,  
Solicitors for Petitioner.



In the United States Circuit Court of Appeals for  
the Ninth Circuit.

**CENTRAL CALIFORNIA CANNERIES**, a Corporation  
(Sometimes Designated **CENTRAL  
CALIFORNIA CANNERIES COMPANY**),  
Petitioner,

vs.

**DUNKLEY COMPANY**, a Corporation,  
Respondent.

**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

Central California Canneries, a corporation  
(sometimes designated Central California Canneries  
Company), presents this its petition against Dunk-  
ley Company, a corporation and respectfully shows:

I.

Petitioner hereby adopts and incorporates all of  
the allegations, matters and things contained in the  
petition of Hunt Brothers Company for leave to  
file a bill in the nature of a bill of review, filed  
concurrently herewith, to the same effect as if  
herein set forth at length, substituting, however,  
the name of petitioner for the name of Hunt Broth-  
ers Company where the same appears in said peti-  
tion, and substituting the name of Hunt Brothers



Company for the name of petitioner where the same appears (except where reference is made to the title of the record in this Court of "*Central California Canneries Company et al.*, Appellants, *vs. Dunkley Company*, Appellee, No. 2915").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company*, Plaintiff, *vs. Central California Canneries Company*, Defendant, being Equity Case No. 201 in said court, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,  
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL,

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal]

L. BELLE WEAVER,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Central California Canneries, a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition this 6th day of January, 1922. Fred L. Chappell, and W. A. Richardson,

Counsel for Dunkley Co. and Michigan Canning & Mch'y Co.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

GRIFFIN & SKELLEY COMPANY, a Corpora-  
tion,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning & Machinery Company, and to Messrs. Fred L. Chappell and W. A. Richardson, Counsel and Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that on February 6, 1922, at the hour of 10:30 A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court in the United States Post Office and Courthouse Building in the City and County of San Francisco, California, Griffin & Skelley Company will move the Court for an order permitting it to file a bill in the nature of a bill of review to have reviewed, reversed and set aside that certain interlocutory decree made and entered in the United States District Court for the Northern District of California, Southern Division, Second Division, on December 8, 1916, in the case of *Dunkley*

*Company*, Plaintiff, vs. *Griffin & Skelley Comapny*, Defendant, Equity No. 202, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled Court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
 FREDERICK S. LYON,  
 FRANCIS J. HENEY,  
 KEMPER B. CAMPBELL,  
 Solicitors for Petitioner.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

GRIFFIN & SKELLEY COMPANY, a Corpora-  
tion,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,

Respondent.

**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

Griffin & Skelley Company, a corporation, pre-  
sents this its petition against Dunkley Company, a  
corporation, and respectfully shows:

I.

Petitioner hereby adopts and incorporates all of  
the allegations, matters and things contained in the  
petition of Hunt Brothers Company for leave to  
file a bill in the nature of a bill of review, filed  
concurrently herewith, to the same effect as if  
herein set forth at length, substituting, however, the  
name of petitioner for the name of Hunt Brothers  
Company where the same appears in said petition,  
and substituting the name of Hunt Brothers Com-  
pany for the name of petitioner where the same  
appears (except where reference is made to the title



of the record in this Court, of "*Central California Canneries Company, et al., Appellants, vs. Dunkley Company, Appellee, No. 2915*").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company, Plaintiff, vs. Griffin & Skelley Company, Defendant*, being Equity Case No. 202 in said court, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on

oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal]

L. BELLE WEAVER,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Griffin & Skelley, a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition this 6th day of January, 1922. Fred L. Chappell, W. A. Richardson, Counsel for Dunkley Co. and Michigan Canning & Mch'y Co.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

J. C. AINSLEY PACKING COMPANY, a Cor-  
poration,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,

Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning & Ma-  
chinery Company, and to Messrs. Fred L. Chap-  
pell and W. A. Richardson, Counsel and  
Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY  
NOTIFIED that on February 6, 1922, at the hour  
of 10:30 A. M., or as soon thereafter as counsel can  
be heard, in the courtroom of the above-entitled  
court in the United States Post Office and Court-  
house Building in the City and County of San Fran-  
cisco, California, J. C. Ainsley Packing Company  
will move the Court for an order permitting it to  
file a bill in the nature of a bill of review to have  
reviewed, reversed and set aside that certain inter-  
locutory decree made and entered in the United  
States District Court for the Northern District of  
California, Southern Division, Second Division, on  
December 8, 1916, in the case of *Dunkley Company*,  
Plaintiff, vs. *J. C. Ainsley Packing Company*, De-

fendant, Equity No. 205, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Ander-son-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court, of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

Solicitors for Petitioner.



In the United States Circuit Court of Appeals for  
the Ninth Circuit.

**J. C. AINSLEY PACKING COMPANY**, a Corporation.

Petitioner,

vs.

**DUNKLEY COMPANY**, a Corporation,

Respondent.

**Petition for Leave to File in the District Court of  
the United States in and for the Northern Dis-  
trict of California, Southern Division, Second  
Division, an Original Bill in the Nature of a  
Bill of Review.**

To the Honorable Judges of said Court:

J. C. Ainsley Packing Company, a corporation,  
presents this its petition against Dunkley Company,  
a corporation, and respectfully shows:

I.

Petitioner hereby adopts and incorporates all of  
the allegations, matters and things contained in the  
petition of Hunt Brothers Company for leave to  
file a bill in the nature of a bill of review, filed con-  
currently herewith, to the same effect as if herein  
set forth at length, substituting, however, the name  
of petitioner for the name of Hunt Brothers  
Company where the same appears in said petition,  
and substituting the name of Hunt Brothers Com-  
pany for the name of petitioner where the same ap-  
pears (except where reference is made to the title of



the record of this Court of "*Central California Canners Company et al.*, Appellants, *vs. Dunkley Company*, Appellee, No. 2915").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in the said case of *Dunkley Company*, Plaintiff, *vs. J. C. Ainsley Packing Company*, Defendant, being Equity Case No. 205, in said Court, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on

oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal] L. BELLE WEAVER,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. J. C. Ainsley Packing Co., a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received Copy of the Within Notice and Petition this 6th day of January, 1922. Fred L. Chappell, W. A. Richardson, Counsel for Dunkley Co. and Michigan Canning & Meh'y Co.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

ANDERSON-BARNGROVER MANUFACTUR-  
ING COMPANY, a Corporation,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,

Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning &  
Machinery Company, and to Messrs. Fred L.  
Chappell and W. A. Richardson, Counsel and  
Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY  
NOTIFIED that on February 6, 1922, at the hour  
of 10:30 A. M., or as soon thereafter as counsel can  
be heard, in the courtroom of the above-entitled  
court in the United States Post Office and Court-  
house Building in the City and County of San  
Francisco, California, Anderson-Barngrover Manu-  
facturing Company will move the Court for an or-  
der permitting it to file a bill in the nature of a  
bill of review to have reviewed, reversed and set  
aside that certain interlocutory decree made and  
entered in the United States District Court for the  
Northern District of California, Southern Divi-  
sion, Second Division, on December 8, 1916, in the  
case of *Dunkley Company*, Plaintiff, vs. *Anderson-  
Barngrover Manufacturing Company*, Defendant,

Equity No. 206, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
 FREDERICK S. LYON,  
 FRANCIS J. HENEY,  
 KEMPER B. CAMPBELL,  
 Solicitors for Petitioner.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

ANDERSON-BARNGROVER MANUFACTUR-  
ING COMPANY, a Corporation,  
Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Petition for Leave to File in the District Court of  
the United States in and for the Northern Dis-  
trict of California, Southern Division, Second  
Division, an Original Bill in the Nature of a  
Bill of Review.**

To the Honorable Judges of said Court:

Anderson-Barngrover Manufacturing Company,  
a corporation, presents this its petition against  
Dunkley Company, a corporation, and respectfully  
shows:

I.

Petitioner hereby adopts and incorporates all of  
the allegations, matters and things contained in the  
petition of Hunt Brothers Company for leave to file  
a bill in the nature of a bill of review, filed concu-  
rently herewith, to the same effect as if herein set  
forth at length, substituting, however, the name of  
petitioner for the name of Hunt Brothers Company  
where the same appears in said petition, and sub-  
stituting the name of Hunt Brothers Company for  
the name of petitioner where the same appears (ex-



cept where reference is made to the title of the record in this Court of "*Central California Canneries Company, et al., Appellants, vs. Dunkley Company, Appellee, No. 2915*").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company, Plaintiff, vs. Anderson-Barngrover Manufacturing Company, Defendant*, being equity case No. 206, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,  
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal] L. BELLE WEAVER,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Anderson-Barngrover Mfg. Co., a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition, this 6th day of January, 1922. Fred L. Chappell,

W. A. Richardson, Counsel for Dunkley Co. and  
Michigan Canning & Mch'y Co.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

GOLDEN GATE PACKING COMPANY, a Cor-  
poration,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,

Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning &  
Machinery Company, and to Messrs. Fred L.  
Chappell and W. A. Richardson, Counsel and  
Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY  
NOTIFIED that on February 6, 1922, at the hour  
of 10:30 A. M., or as soon thereafter as counsel can  
be heard, in the courtroom of the above-entitled  
court in the United States Post Office and Court-  
house Building in the City and County of San  
Francisco, California, Golden Gate Packing Com-  
pany will move the Court for an order permitting  
it to file a bill in the nature of a bill of review to  
have reviewed, reversed and set aside that certain  
interlocutory decree made and entered in the United  
States District Court for the Northern District of  
California, Southern Division, Second Division, on

December 8, 1916, in the case of *Dunkley Company*, Plaintiff, vs. *Golden Gate Packing Company*, Defendant, Equity No. 209, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
Solicitors for Petitioner.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

GOLDEN GATE PACKING COMPANY, a Cor-  
poration,

Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,

Respondent.

**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

Golden Gate Packing Company, a corporation,  
presents this its petition against Dunkley Com-  
pany, a corporation, and respectfully shows:

I.

Petitioner hereby adopts and incorporates all  
of the allegations, matters and things contained in  
the petition of Hunt Brothers Company for leave  
to file a bill in the nature of a bill of review, filed  
concurrently herewith, to the same effect as if  
herein set forth at length, substituting, however,  
the name of petitioner for the name of Hunt Broth-  
ers Company where the same appears in said  
petition, and substituting the name of Hunt Broth-  
ers Company for the name of petitioner where the  
same appears (except where reference is made to



the title of the record in this Court of “*Central California Canneries Company, et al., Appellants, vs. Dunkley Company, Appellee, No. 2915*”).

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company, Plaintiff, vs. Golden Gate Packing Company, Defendant*, being equity case No. 209, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENRY,

KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on

oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal]

L. BELLE WEAVER,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Golden Gate Packing Co., a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received Copy of the Within Notice and Petition, this 6th day of January, 1922. Fred L. Chappell, W. A. Richardson, Counsel for Dunkley Co., and Michigan Canning & Mach'y Co.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

J. F. PYLE & SON, INC., a Corporation,  
Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning &  
Machinery Company, and to Messrs. Fred L.  
Chappell and W. A. Richardson, Counsel and  
Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY  
NOTIFIED that on February 6, 1922, at the hour  
of 10:30 A. M., or as soon thereafter as counsel  
can be heard, in the courtroom of the above-en-  
titled court in the United States Postoffice and  
Courthouse Building in the City and County of  
San Francisco, California, J. F. Pyle & Son, Inc.,  
will move the Court for an order permitting it to  
file a bill in the nature of a bill of review to have  
reviewed, reversed and set aside that certain in-  
terlocutory decree made and entered in the United  
States District Court for the Northern District of  
California, Southern Division, Second Division, on  
December 8, 1916, in the case of *Dunkley Company*,  
Plaintiff, vs. *J. F. Pyle & Son, Inc.*, Defendant,  
Equity No. 210, and to that end will present the  
petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Anderson-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Company*, a Corporation, Appellants, vs. *Dunkley Company*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
 FREDERICK S. LYON,  
 FRANCIS J. HENEY,  
 KEMPER B. CAMPBELL,  
 Solicitors for Petitioner.

---

In the United States Circuit Court of Appeals for  
 the Ninth Circuit.

J. F. PYLE & SON, INC., a Corporation,  
 Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
 Respondent.



**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

J. F. Pyle & Son, Incorporated, a corporation,  
presents this its petition against Dunkley Company,  
a corporation, and respectfully shows:

I.

Petitioner hereby adopts and incorporates all of the allegations, matters and things contained in the petition of Hunt Brothers Company for leave to file a bill in the nature of a bill of review, filed concurrently herewith, to the same effect as if herein set forth at length, substituting, however, the name of petitioner for the name of Hunt Brothers Company where the same appears in said petition, and substituting the name of Hunt Brothers Company for the name of petitioner where the same appears (except where reference is made to the title of the record in this Court of "*Central California Canneries Company, et al., Appellants, vs. Dunkley Company, Appellee, No. 2915*").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company



is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the 8th day of December, 1916, in said case of *Dunkley Company*, Plaintiff, vs. *J. F. Pyle & Son, Inc.*, Defendant, being equity case No. 210, and for such other relief as may be appropriate in the premises.

W. J. CARR,

FREDERICK S. LYON,

FRANCIS J. HENEY,

KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal]

L. BELLE WEAVER,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. J. F. Pyle & Son, Inc., a Corporation, Petitioner, vs. Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition, this 6th day of January, 1922, Fred L. Chappell, W. A. Richardson, Counsel for Dunkley Co., and Michigan Canning & Mch'y Co.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

SUNLIT FRUIT COMPANY, a Corporation,  
Petitioner,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Notice of Motion.**

To Dunkley Company and Michigan Canning & Machinery Company, and to Messrs. Fred L. Chappell and W. A. Richardson, Counsel and Solicitors for said Companies:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that on February 6, 1922, at the hour of 10:30 A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court in the United States Post Office and Courthouse Building in the City and County of San Francisco, California, Sunlit Fruit Company will move the Court for an order permitting it to file a bill in the nature of a bill of review to have reviewed, reversed and set aside that certain interlocutory decree made and entered in the United States District Court for the Northern District of California, Southern Division, Second Division, on December 8, 1916, in the case of *Dunkley Company*, Plaintiff, vs. *Sunlit Fruit Company*, Defendant, Equity No. 212, and to that end will present the petition for such leave accompanying this notice.

Said motion will be based upon the matters and things set forth in said petition, and on the record in the above-entitled court, of *Central California Canneries Company*, a Corporation, *Griffin & Skelley Company*, *J. C. Ainsley Packing Company*, *Ander-son-Barngrover Manufacturing Company*, *Golden Gate Packing Company*, *J. F. Pyle & Son, Incorporated*, *Hunt Brothers Company*, *Sunlit Fruit Com-pany*, a Corporation, Appellants, vs. *Dunkley Com-*

*pany*, a Corporation, Appellee, No. 2915, including the record on appeal to said Court from the order of said District Court granting the motion of the Dunkley Company for a substitution or addition of parties plaintiff, and upon the record in this Court of *Dunkley Company and Michigan Canning & Machinery Company*, Plaintiffs-Appellants, vs. *Pasadena Canning Company and George E. Grier*, Defendants-Appellees, No. 3316.

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,  
Solicitors for Petitioner.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

SUNLIT FRUIT COMPANY, a Corporation,  
Plaintiff,

vs.

DUNKLEY COMPANY, a Corporation,  
Respondent.

**Petition for Leave to File in the District Court  
of the United States in and for the Northern  
District of California, Southern Division, Sec-  
ond Division, an Original Bill in the Nature  
of a Bill of Review.**

To the Honorable Judges of said Court:

Sunlit Fruit Company, a corporation, presents

this its petition against Dunkley Company, a corporation, and respectfully shows:

I.

Petitioner hereby adopts and incorporates all of the allegations, matters and things contained in the petition of Hunt Brothers Company for leave to file a bill in the nature of a bill of review, filed concurrently herewith, to the same effect as if herein set forth at length, substituting, however, the name of petitioner for the name of Hunt Brothers Company where the same appears in said petition, and substituting the name of Hunt Brothers Company for the name of petitioner where the same appears (except where reference is made to the title of the record in this Court of "*Central California Canneries Company et al.*, Appellants, vs. *Dunkley Company*, Appellee, No. 2915").

WHEREFORE, petitioner respectfully prays that this Honorable Court take cognizance of and examine the new matter herein referred to, and that an order be made by this Court granting the petitioner leave to file against the respondent, Dunkley Company (and the Michigan Canning & Machinery Company, if petitioner be advised that said company is a necessary or proper party plaintiff), in the United States District Court in and for the Northern District of California, Southern Division, Second Division, an original bill in the nature of a bill of review setting up the new matter referred to in this petition and seeking to have reviewed, reversed and set aside that certain interlocutory decree pronounced by said Court against said petitioner on the



8th day of December, 1916, in said case of *Dunkley Company*, Plaintiff, vs. *Sunlit Fruit Company*, Defendant, being Equity Case No. 212, and for such other relief as may be appropriate in the premises.

W. J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
KEMPER B. CAMPBELL,

Solicitors and Counsel for Petitioner.

State of California,  
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn on oath, deposes and says: That he is one of counsel for the petitioner in the foregoing petition; that he has read the foregoing petition and is familiar with the contents thereof, and has read the petition of Hunt Brothers Company referred to and incorporated therein by appropriate reference, and is familiar with the contents of said petition, and that the facts stated in the foregoing petition and in said petition of Hunt Brothers Company are true.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 5th day of January, 1922.

[Seal] L. BELLE WEAVER,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Sunlit Fruit Company, a Corporation, Petitioner, vs.

Dunkley Company, a Corporation, Respondent. Notice of Motion and Petition for Leave to File in the District Court of the United States in and for the Northern District of California, Southern Division, Second Division, an Original Bill in the Nature of a Bill of Review. Received copy of the within notice and petition this 6th day of January, 1922. Fred L. Chappell, W. A. Richardson, Counsel for Dunkley Co. & Michigan Canning & Mch. Co. Filed Jan. 6, 1922. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

NO. 60211

# United States Circuit Court of Appeals

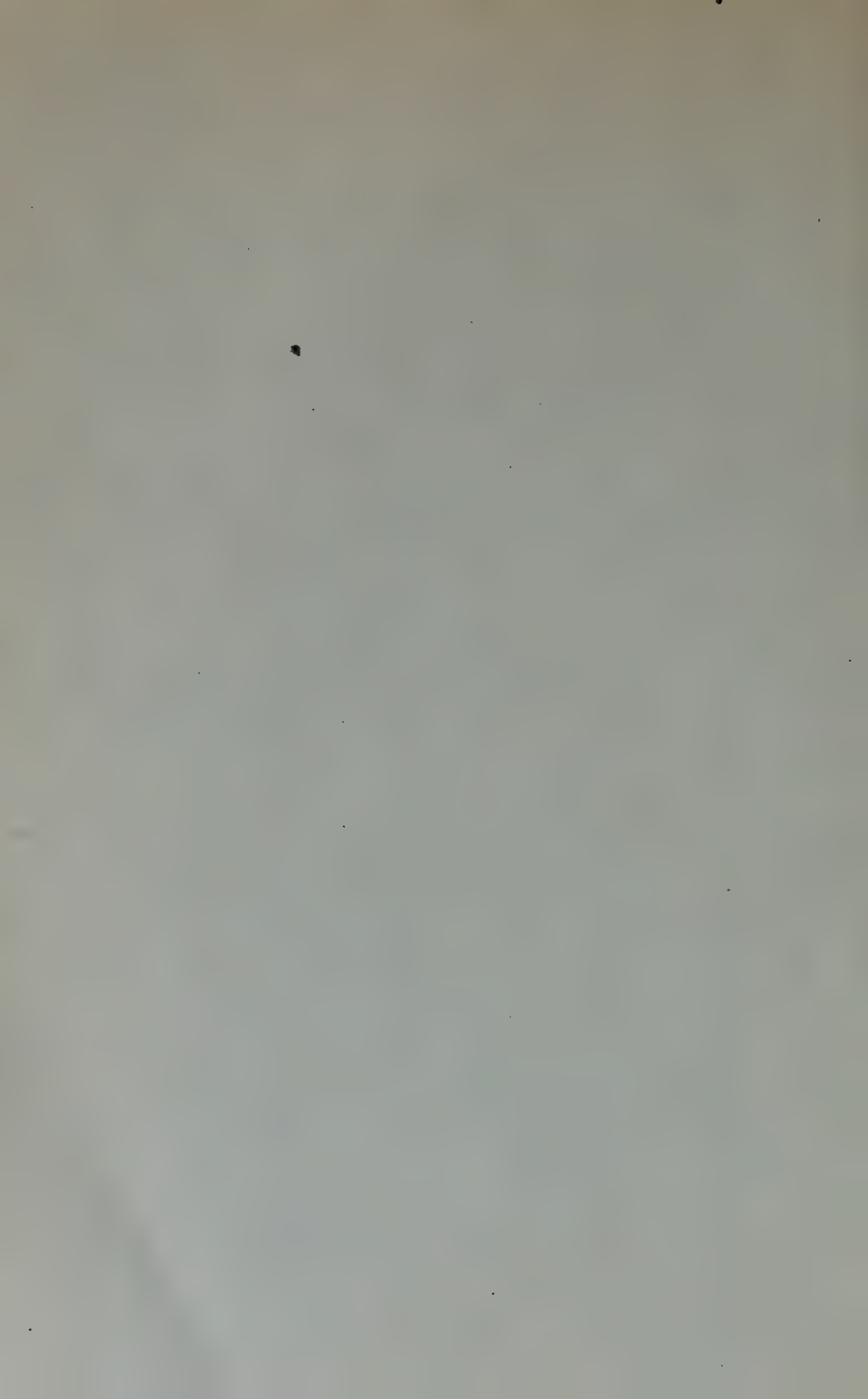
For the Ninth Circuit.

11

CENTRAL CALIFORNIA CANNERIES COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
GRIFFIN & SKELLEY COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
J. C. AINSLEY PACKING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
ANDERSON-BARNGROVER MANUFACTURING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
GOLDEN GATE PACKING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
J. F. PYLE & SON, INCORPORATED, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
HUNT BROTHERS COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
SUNLIT FRUIT COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>

**PETITIONERS' POINTS AND AUTHORITIES ON MOTIONS AND  
PETITIONS FOR LEAVE TO FILE IN THE DISTRICT COURT OF  
THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT  
OF CALIFORNIA, SOUTHERN DIVISION, SECOND DIVISION  
ORIGINAL BILLS IN THE NATURE OF BILLS OF REVIEW.**

KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
*Counsel for Petitioners.*



## INDEX TO POINTS AND AUTHORITIES.

	PAGE
STATEMENT OF PETITIONERS' POSITION.....	4
First. Invalidity of Dunkley patent heretofore decreed by this court.	
Second. In any event the petitioner is entitled to rehearing by reason of Dunkley's changes in testimony, and other newly discovered evidence.	
PROCEDURE .....	5
Petitioners cite:	
National Brake and Electric Co. v. Christensen, 254 U. S. 425.....	5
John Simmons Co. v. The Grier Brothers Co., U. S. Supreme Court, February 27, 1922.....	5
Barber v. Otis Motor Sales Co., 271 Fed. 171 C. C. A. Ninth Circuit, February 9, 1921.....	5
LITIGATION OVER DUNKLEY PATENT.....	6
Containing a brief recital of the various suits in- volving the Dunkley patent.	
GENERAL CONSIDERATIONS BEARING UPON THE UN- DERLYING EQUITY OF THESE APPLICATIONS.....	9
1. Petitioners now under injunction and account- ing pending—patent adjudged invalid as to practically all others.	
2. New and additional evidence bears approval of two able trial judges, Judges Trippet and Hand.	
3. New evidence of unequivocal character. Dunk- ley changed testimony in vital particulars.	
4. The rule of <i>falsus in uno, falsus in omnibus</i> invoked by this court as to testimony of Stewart Campbell now peculiarly applicable to testimony of the Dunkleys.	
5. Mass of new evidence entirely independent of showing heretofore made in case at bar.	
NEW MATTER ANALYZED.....	11
1. Under this heading some of the new matter is briefly enumerated, and its general character shown.	



THE PROOFS IN BEHALF OF DUNKLEY ARE NOW LEGALLY INSUFFICIENT TO SUSTAIN THE PATENT. AUTHORITIES, INCLUDING ILLUSTRATIVE AND UNI- FORM DECISIONS OF THE U. S. SUPREME COURT, SECOND, THIRD, FOURTH, SIXTH, SEVENTH AND EIGHTH CIRCUIT COURTS OF APPEAL AND VARIOUS DISTRICT COURTS, REVIEWED.....	15
American Graphophone Co. v. Gimbel Broth- ers, 234 Fed. 344.....	39
Amer. Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986.....	39
Automatic Weighing Machine Co v. Pneumatic Scale Corporation, 166 Fed. 301 (C. C. A. First Circuit) .....	37
Barber v. Otis Motor Sales Co., 271 Fed. 171 (C. C. A., Second Circuit) February 9, 1921..	28
Clark Thread v. Williamantic Linen Co., 35 L. Ed. 521, 140 U. S. 481.....	19
Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622 (C. C. A. Sixth Circuit).....	35
Consolidated Ry. Co. v Adams & Westlake Co, 161 Fed. 343 (C. C. A. Seventh Circuit).....	37
Corrugated Paper Patent Co. v. Paper Working M. Co., 237 Fed. 380.....	39
Dey Time Register Co. v. W. H. Bundy Re- cording Co. (C. C. A., Second Circuit), 178 Fed. 812.....	23
Eck v. Kutz, 132 Fed. 763.....	18
Evans v. Associated Automatic Sprinkler Co., 229 Fed. 1007.....	40
Hunnicut Co. v. Gaston Co., 218 Fed. 176 (C. C. A. Third Circuit).....	33
Michigan Central R. Co. v. Cons. Car Heating Co., 67 Fed. 121 (C. C. A. Sixth Circuit).....	37
National Machine Corp, Inc. v. Benthall Ma- chine Co., 241 Fed. 72 (C. C. A. Fourth Cir- cuit) .....	34
New England Motor Co v. B. F. Sturtevant Co., 150 Fed. 131 (C. C. A., Second Circuit).....	33

	PAGE
Thayer v. Hart, 20 Fed. 693.....	20, 21
Torrey <i>et al.</i> v. Hancock, 184 Fed. 61 (C. C. A., Eighth Circuit).....	38
Twentieth Century Machinery Co. v. Loew Mfg. Co., 243 Fed. 373 (C. C. A Sixth Circuit).....	36
Westinghouse Elec. and Mfg. Co. v. Catskill Ill. & P. Co., 121 Fed. 831 (C. C. A., Second Circuit) .....	33
Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. L. Co., 108 Fed. 221.....	39
Wheaton v. Kendall, 85 Fed. 666, 672 N. D. Calif. ....	39
CASE AT BAR AS NOW MADE OUT BY NEW EVI- DENCE .....	40

Containing a brief recital with citations to the record showing the facts as now established. NEW MATTERS SET UP IN PARAGRAPH IV OF THE PETITION, ITS MATERIALITY AND EFFECT.....	48
--	----

Dunkley's excuse for shifting forward the date of his invention as testified to by him in the Patent Office in 1910. Dunkley's memory "refreshed" by Clark letter referring to "tank." Clark letter "tank" shown in Pasadena and New York cases to be *soup tank* and not lye tank. Only item of documentary proof now eliminated.

Books and records not destroyed. Now admitted by Dunkley that books and records were not destroyed, as testified to in trial in this case. Their failure to produce records now unexplained.

Long hand-peeling table.

Judge Van Fleet: "The witness has stated that twice, that it was not a peeling table, as you have described it, but it was placed there in 1904 and had an endless conveyor on it and was for inspection purposes. He said no peaches were ever peeled on it." (S. F. Rec. 443, 452, 452.)

Judge Trippet: "The construction of this table, and the existence thereof, in the peach season 1903, is utterly inconsistent with the theory of the plaintiffs' case." (261 Fed. 207.)

The existence of the long hand-peeling apparatus denied in San Francisco case admitted by the Dunkleys in Los Angeles and New York cases. Relevancy explained.

DUNKLEY-NORTON LETTERS..... 59

The significant omissions in the chain of correspondence as produced by the Dunkleys. No letter referring to peeling machine prior to October 23, 1903.

Dunkley testified in case at bar that only two machines were installed prior to November 1, 1904. Photograph of "second machine" identified by many reputable witnesses as installed in 1904.

Correspondence shows the first commercial try-out in summer of 1904. Dunkleys first learn cost of lye in commercial operations.

March 23, 1904: "If our machines for peeling and pitting are successful, which we can be sure about, before the season opens, by getting southern peaches early."

June 8, 1904: "\* \* \* will soon be able to secure a sufficient supply to make a real test of our 'Annanias' and the Pitting Machine."

August 19, 1904: "The prevaricator has been tested."

September 17, 1904: "The peeler works fine."  
\* \* \* "the lye machine takes \$2.00 worth of lye," etc.

WHY DID DUNKLEY DELAY FILING HIS APPLICATION FOR PATENT?..... 68

Amer. Sulphite Pulp Co. v. Howland Falls P. Co., 70 Fed. 986..... 68

Barber v. Otis Motor Sales Co., 271 Fed. 171.... 68

	PAGE
DUNKLEY PAY-ROLLS .....	70
These show convincing documentary proof that there was no commercial use in 1903, as claimed by Dunkley.	
NEWSPAPER ARTICLES.....	75
South Haven Daily Tribune, October 1, 1903. Peeling operations minutely described.	
South Haven Daily Tribune, April 19, 1904. "New peeling machine to be used for first time" in 1904 season.	
ARTHUR W. NORTON TESTIMONY.....	76
Now Vice-President Continental Can Co., Baltimore, Md., son of Edwin Norton, financial backer of Dunkley. Positively contradicts testimony of the Dunkleys.	
NEW MATTER—DILIGENCE IN PRESENTATION.....	78
Petitioners could not anticipate changes in Dunkley testimony.	
Utmost diligence used in unearthing new evidence and in presentation thereof.	
Barber v. Otis Motor Sales Co., 271 Fed. 171, C. C. A. Second Circuit (February 9, 1921).....	
	79
Barber v. Otis Motor Sales Co., 245 Fed. 945.....	
	82
<i>In re</i> Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, <i>supra</i> .....	
	79
John Simmons v. The Grier Bros. Co., decided by Supreme Court February 27, 1922.....	
	79
National Brake and Electric Co. v. Christensen, 254 U. S. 425 (January 3, 1921).....	
	79
Southern Pacific Co. v. Bogert, 250 U. S. 483, 63 L. Ed. 1099.....	
	80
DECISION OF JUDGE VAN FLEET ON PETITIONERS' APPLICATIONS THAT HE REQUEST THIS COURT FOR PERMISSION TO REOPEN.....	82
Order refusing request not appealable. Judge Van Fleet misconceived rule as to burden of proof. Judges Trippet and Hand did not base their decisions upon Stewart Campbell's testimony.	

	PAGE
DUNKLEY HAS CONTRIBUTED NOTHING TO THE PEACH-PEELING ART.....	84
Dunkley not first in any particular.	
The success of lye-peeling came through the invention of halving the peach before submit- ting it to the lye-bath. This was not the Dunkley invention.	
Patent also void because amount of pressure not specified.	
CONCLUSION .....	86



No. 3824.

# United States Circuit Court of Appeals

## For the Ninth District

HUNT BROTHERS COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
CENTRAL CALIFORNIA CANNERIES COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
GRIFFIN & SKELLEY COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
J. C. AINSLEY PACKING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
ANDERSON-BARNGROVER MANUFACTURING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
GOLDEN GATE PACKING COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
J. F. PYLE & SON, INCORPORATED, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>
SUNLIT FRUIT COMPANY, a Corporation,	<i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	<i>Respondent.</i>

**PETITIONERS' POINTS AND AUTHORITIES ON MOTIONS AND  
PETITIONS FOR LEAVE TO FILE IN THE DISTRICT COURT OF  
THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT  
OF CALIFORNIA, SOUTHERN DIVISION, SECOND DIVISION,  
ORIGINAL BILLS IN THE NATURE OF BILLS OF REVIEW.**

## STATEMENT.

These are motions and petitions for leave to file in the United States District Court at San Francisco, a series of original bills, in the nature of bills of review, for newly discovered evidence, and new matter including the later decisions of district and circuit courts of appeals involving the validity of the patent in issue. The purpose sought is to reopen for the reception of additional proofs, the interlocutory decrees affirmed by this court in *Central California Canneries Co. v. Dunkley Co.*, 247 Fed. 790. These decrees are still purely interlocutory. Eight separate cases are here involved, and a separate motion and petition is made in each case. These cases, however, have always been treated as a single case, and will be so treated here. Precisely the same questions are involved in each of the petitions.

Our position in this matter is two-fold:

First, that under the various rulings of this court, including those upon plaintiffs' petitions for rehearing in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, the invalidity of the Dunkley patent has already been decreed by this court; and

Second, that in any event plaintiff herein has in subsequent litigations so changed its testimony, and such new evidence has been discovered and produced that the showing made in behalf of the patentee is under the law and the decisions legally insufficient to sustain the validity of the patent.

### Procedure.

There has long existed with the courts and in the profession some confusion as to the proper practice in matters of this kind. This confusion has at last been set at rest by the decision of the Supreme Court in *National Brake and Electric Co. v. Christensen*, 41 Sup. Ct. Rep. 154, 65 L. Ed. . . . , decided January 3, 1921, and the more recent case of *John Simmons Company v. The Grier Brothers Co.*, decided by the Supreme Court February 27, 1922. A case also "upon all fours" is that of *Barber v. Otis Motor Sales Co.*, 271 Fed. 171, decided by the Circuit Court of Appeals for the Second Circuit February 9, 1921. Under these decisions the petitioners have what is technically called the "right to apply by petition" here "for leave to file a bill in the court of original jurisdiction in the nature of a bill of review, setting up the new matter" (*National Brake and Electric Co. v. Christensen, supra*), or may file a "petition for rehearing" and "if an interlocutory decree be involved, a rehearing may be sought at any time before final decree, provided due diligence employed and a revision be otherwise consonant with equity." (*Simmons Company v. Grier Brothers Co., supra*.)

It is interesting to note that the efforts made by the moving parties in the cases above referred to to secure consideration of the new matter in the court below were quite similar to the attempts made by the petitioners here. In each, the decrees under attack were interlocutory.

Petitioners having acted promptly after denial of relief in the lower court, their diligence cannot now be successfully questioned in view of the holdings of the courts in the cases above cited.

NOTE. By the expression "old Dunkley Company," as used herein, is meant the Michigan Canning & Machinery Co., the new name of the Dunkley Co. which was the plaintiff in the suits sought to be reviewed. By the expression "new Dunkley Company" is meant the new corporation organized under this name after the name of the old Dunkley Co. was changed, and to which the old Dunkley Co. assigned the patent. By "Pet." is meant the printed copy of the petitions filed. Reference to the petition will usually be the petition of Hunt Brothers Company, the other petitions for sake of brevity, simply adopting by reference the matters contained in this. By "S. F. Rec." is meant the record on appeal to this court from the original interlocutory decrees here sought to be reviewed. By "L. A. Rec." is meant the record on appeal to this court in the case of *Michigan Canning & Machinery Co. et al., vs. Pasadena Canning Co. et al.* By "Rec. on Appeal" is meant the record on appeal from the order of Judge Van Fleet admitting a new party plaintiff, No. 3824.

### Litigation Over Dunkley Patent.

The history of the litigation over the Dunkley patent may be stated very briefly as follows:

The first suits (being the ones here involved) were brought in the District Court at San Francisco and resulted in interlocutory decrees that the patent was valid and infringed. These decrees were affirmed by this Court (*Central California Canneries Co. v. Dunkley Co.*, 247 Fed. 790). The next suit was brought and tried in the District Court at Los Angeles, and resulted in a decree that the patent was invalid. (*Michigan Canning & Machinery Co., et al., v. Pasadena Canning Co., et al.*, 261 Fed. 203.) This decree was affirmed by this court on the ground of non-infringement. (*Id.* 261 Fed. 386.) Petitions for rehearing were filed and both plaintiffs and defendants pointed out that the record plainly showed that there were two



machines involved, the first of which concededly employed a "peeling jet." On this hearing, Presiding Judge Gilbert stated:

"It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. *We were very firmly of the opinion that the decision of the court below should be affirmed.* The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected."

The petition was denied. Thereupon a petition to the Supreme Court for *certiorari* was filed by the plaintiffs, in which it was again urged that the Circuit Court of Appeals for the Ninth Circuit had either decided that the first spray device of Grier did not infringe, or that the court had ignored the issue raised as to this device and the evidence thereon. In response to this defendants replied, contending that this court had by its action affirmed the District Court in holding the patent void for anticipation, but if not, then the defendants joined with plaintiffs in their petition to the Supreme Court for *certiorari*, in order that the issues raised in the case might be finally determined in accordance with the proofs submitted. The petition was denied.

The next suit was tried in the District Court at New York, and resulted in a decree for defendant on the ground the patent was invalid and also because



the defendant had a license. *Dunkley Co. v. California Packing Corporation* (277 Fed. 989, <sup>unreported</sup>). This decree was affirmed by the Circuit Court of Appeals for the Second Circuit, the appellate court placing its affirmance on the second ground. (Id. 277, Fed. 796.) These various decisions have been printed in pamphlet form and are filed herein for the convenience of the court.

In the trial of the case at bar, defendants were caught unaware by an unexpected shifting of dates by the Dunkleys from the year 1903 to 1902. Even so, the trial court held under the evidence there presented that "it is a very close question as to which of the two minds, that of Grier or that of Dunkley, the first conception of that idea came. They were very nearly contemporaneous \* \* \*." And this court also pointed out that "the ideas of Grier and the plaintiff may have been contemporaneous," but priority was awarded to Dunkley, credence being given to his story of an earlier reduction to practice. If it was a close question on the record formerly submitted in this case, there should now be no question at all but that the holding should be against Dunkley under the record now submitted in the light of the burden of proof placed upon Dunkley under the decisions of the Supreme Court and the various circuits courts of appeals in similar cases.

## General Considerations Bearing Upon the Underlying Equity of These Applications.

1. There exist conflicting decisions on the Dunkley patent. One court has held it valid. Two courts have held it invalid. As to these petitioners, the patent monopoly holds. As to their competitors, the Southern California canners, the patent is invalid. It is good in one district and bad in another. Some one is being wronged.

2. The new and additional evidence upon which relief is sought carries the approval of two able trial judges—Judges Trippet and Hand. It has been before this court on the appeal from Judge Trippet's decision, and this court has affirmed that decision without qualification. Most of this evidence was presented in open court, and witnesses were extensively cross-examined. It is not fairly comparable to the testimony by affidavit upon which applications like this are commonly founded. (Some of the evidence here presented is in addition to that before Judge Trippet.)

3. Much of this new and additional evidence is of the most unequivocal character. Vital changes of testimony by the two Dunkleys is a matter of record. There is a large amount of documentary proof.

4. There is a curious and peculiar equity here present, in this: This court, in affirming the interlocutory decrees in the cases sought to be reopened, applied the rule of *falsus in uno, falsus in omnibus*, to the testimony of one Stewart Campbell, a witness

of petitioners, and rejected all of his testimony. Strangely enough, the situation is now reversed. The two Dunkleys have changed their testimony, and this in important particulars and under circumstances casting grave suspicion upon their *bona fides* in the trial at San Francisco. Why should not this court apply the same yardstick in measuring their testimony now that it did apply then in measuring the testimony of Stewart Campbell?

5. The evidence upon which this petition is based covers in most minute detail all of the developments at the Dunkley cannery at the little lake town of South Haven, Michigan, during the years of 1902, 1903 and 1904. From this evidence it is possible to reproduce occurrences there literally from day to day. It is utterly impossible to fit the events found by the court below into the picture thus portrayed. Judge Van Fleet, in ruling upon the application to reopen made before him (in addition to entirely misconceiving the rule of law as to the burden of proof), fell into the error of thinking that the decisions of Judges Trippet and Hand depended upon the testimony of Stewart Campbell, a witness whom he was unwilling to believe. The fact of the matter is that if Stewart Campbell had died years ago, the picture would be just as clear. His testimony was quite unessential. The facts to which he testified were proven by the testimony of many other witnesses.

### New Matter Analyzed.

The new matter set up in the petitions herein bears directly upon the date of the alleged Dunkley invention. It may be classified briefly as follows:

1. Subsequent vital changes in testimony by S. J. Dunkley, the alleged inventor, and Melville E. Dunkley, his son, executive officers of both the old and the new Dunkley Company and the main witnesses whose testimony was accepted to carry back the date of the alleged Dunkley invention to a point where it was not anticipated by the Grier invention. For example, in the trial of the case at bar, plaintiff, recognizing the necessity for the introduction of documentary proofs to carry its date back prior to Grier, brought forward a letter from the Clark Engine and Boiler Co., dated April 21, 1903, which referred to a "tank." This the Dunkleys testified was the first lye tank. This letter was also utilized to refresh the memory of the Dunkleys, thus justifying a radical change from testimony given by them in a proceeding in the Patent Office wherein they asserted that their first experimental machine was made in July, 1903. (In order to avoid the effect of the Grier defense, they were under the necessity of shifting their date still farther back to the year 1902.) In later litigations they have been forced to admit that the Clark Engine and Boiler Company letter did not refer to a lye tank at all, but to a *soup tank*, thus eliminating their sole item of documentary proof.

In the trial of the case at bar, they also offered as an excuse for their failure to produce books and rec-



ords, the alleged fact that their factory had burned and the books and records had been destroyed by fire. In later litigations, they have been forced to admit that the books and records were not burned, and that they still have them and their absence is unaccounted for.

In the trial of the case at bar, the existence in 1903 of an elaborate conveyor-table for the *peeling of peaches by hand* was denied, it being asserted that practically all of the peaches were peeled by a large commercial lye peeling machine. In later litigation, this table was admitted by the Dunkleys, a fact, as pointed out by Judge Trippet, inconsistent with plaintiffs' theory. It is inconsistent because if Plaintiffs' Exhibit 10 had been constructed and successfully tried out in 1902 and had been again tried out with a lye tank in July, 1903, and its success assured, the plaintiffs would not, in August, 1903, have set Stewart Campbell at the making of an elaborate and most expensive apparatus designed only for the peeling of peaches by hand. It is also inconsistent with the plaintiffs' theory, because of the physical dimensions of the room and the space which it occupied, as will be hereinafter pointed out.

2. A series of letters passing between S. J. Dunkley and Edwin Norton and O. W. Norton, his financial backers, produced by S. J. Dunkley in the trial of the Los Angeles case to refresh his memory and promptly introduced in evidence by the defendants there. Among many other facts established by these letters, contrary to plaintiffs' contentions, is the important one that the second machine which Dunkley made, his first three-



line commercial machine as distinguished from Plaintiffs' Exhibit 10, an experimental model, was made by Stewart Campbell between the month of November, 1903 (after the peach season of that year), and the peach season of 1904, and was installed by him and used for the first time in the season of 1904. The Dunkleys had testified in the case at bar that only two machines had been constructed prior to November 1, 1904, and in the Pasadena case, although they attempted for a time to inject a third machine they finally gave it up in despair and returned to their San Francisco testimony that there were but two machines all told.

The effect of this is to completely destroy their story as to their operations in 1903, as it is not pretended by them that the little experimental model machine could or did handle any considerable number of peaches. Thus Dunkley, even if we believe his story that Exhibit No. 10 was made in 1902, has let a complete peach season go by without development, and Grier is first under the conceded facts. It is abundantly shown, however, that plaintiff's experimental model machine was made by Stewart Campbell in the fall of 1903 and first tried out in October of that year. That the Dunkley machine was first commercially used in 1904 is conclusively established by these letters. There is no letter or other document of date prior to October 23, 1903, which refers to a lye peeling machine, or any part of it, and the letter of October 23, 1903, undoubtedly has reference to the experimental model machine which Campbell had just completed and tried out. Un-

der the decisions of the courts hereinafter cited, bearing upon the patentee's endeavor to carry back his date of invention prior to his date of application, the Dunkley-Norton letters must be construed most strongly against Dunkley.

3. Certain documentary proofs presented for the first time in the New York case, including the Dunkley payrolls. These payrolls show defendants' witnesses to have been remarkably accurate as to the times of their employment and the nature of their work, and demonstrate the falsity of Dunkley's claim that he peeled practically all of his peaches by the lye machine in the year 1903.

4. Certain evidence discovered by the moving parties here after the trial of both the Los Angeles and New York cases, one item of which is a newspaper article published in a South Haven paper in April, 1904 (supported by the affidavit of its author in regard thereto), describing the Dunkley peach peeling machine as being a new machine "to be used for the first time this season." There is also another newspaper article under date of October 12, 1903, describing minutely the plaintiffs' peeling operations in the Dunkley factory in 1903. The peaches were peeled *by hand* and not by lye. There is also the affidavit of Arthur Norton, vice-president of the Continental Can Co., Baltimore, Maryland, the son of Edwin Norton, financial backer of Dunkley. Arthur Norton represented his father at the Dunkley plant and was intimately familiar with the development of the Dunkley machine.)

5. A large amount of evidence, both oral and documentary, presented in the Los Angeles case and before the court in the New York case.

This new matter will be briefly analyzed hereinafter, and appropriate references given. Much other new evidence and many other important contradictions and modifications could well be included in our brief, but we forego for sake of brevity. The record now comprises many thousands of pages. For a complete analysis of the testimony (with the exception of that adduced in the New York cases), we respectfully refer to pages 1-138 of the Brief of Defendants-Appellees, filed in this court in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, Equity No. 3316.

**The Proofs in Behalf of Dunkley Are Now Legally Insufficient to Sustain the Patent. Authorities—Including Illustrative and Uniform Decisions of U. S. Supreme Court, Second, Third, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals and Various District Courts.**

Dunkley filed his patent application November 29th, 1904. Under the uniform holdings of all the courts, Dunkley is only entitled to the date of *November 29th, 1904*, as the presumptive date of his invention.

It is shown in this case, and it has been previously held by this court (247 Fed. 790, 793), that Grier conceived his anticipating device in the summer of 1902, and completed his reduction of the same to practice in the summer of 1903. The completion of two large commercial machines by Grier and their final installa-

tion in July, 1903, stand conceded. He began the work of actual construction early in April, 1903.

In order for Dunkley to "carry back" the date of his invention beyond November 29th, 1904, and prior to the dates of Grier, it is necessary under the unanimous decisions of the courts that Dunkley prove his prior date of invention by proof of the same character as that required to establish an anticipation, usually designated as "proof beyond a reasonable doubt." *Having established invention by Grier at a date prior to the date of Dunkley the courts uniformly and unanimously hold that the burden has shifted to Dunkley. This burden can only be met by the strictest character of proof.*

As the record in the case at bar is now made up in this proceeding, plaintiff's attempt to "carry back" the date of invention is supported solely by oral testimony. This oral testimony is furnished by the alleged inventor, his son, his sister-in-law and two employees, who are dependent upon him for a living, and all of these witnesses (except one) had previously testified clearly and unequivocally in an interference proceeding in the Patent Office that Dunkley's first experimental device, the brush and spray part of the alleged invention, to-wit, Plaintiff's Exhibit 10 herein, was made in July, 1903—almost one year later than the time now asserted.

Other witnesses called by plaintiff gave immaterial and frivolous testimony. No witness called by plaintiff claims to have made the machines involved here, nor were any of said witnesses employed exclusively in the peeling department of the Dunkley cannery. No



records of purchase of materials for the making of the Dunkley machine, or lye for its operation, in the years 1902 or 1903 were produced by plaintiff, either from its own books or from the books of anyone alleged to have furnished such materials or supplies. Indeed, it is significant to note that plaintiff's witnesses have no memory whatever as to the origin of any of such materials or supplies. Plaintiff's case, as it now stands, is entirely barren of any circumstantial corroboration, either oral or documentary.

An analysis of the testimony of the plaintiff's witnesses, other than the five named, appears at pages 212-247 of the brief of defendants-appellees filed in this court in the case of *Dunkley Company et al. v. Pasadena Canning Company, et al.*, Equity No. 3316, and the testimony of the five witnesses is analyzed at pages 278-338 of said brief. We respectfully refer to this treatment of the record as containing concise excerpts from the testimony sufficient to demonstrate conclusively the inadequacy of plaintiff's showing under the decisions hereinafter cited.

We respectfully refer also to a brief resume of plaintiff's evidence contained at pages 26-42 of a "Memorandum of Defendants' Motion to Re-open," entitled in the case at bar in the District Court and filed herewith. This memorandum, consisting of 117 pages, comprises a carefully prepared digest of the entire record to date, including the interference proceeding in the Patent Office, the case of *Dunkley Company v. California Cannery Company*, 203 In Equity, Northern District of California; *Dunkley Company, et al., v.*



*Pasadena Canning Company, et al.*, 261 Fed. 203, and *Dunkley Company v. California Packing Corporation*, S. D. New York (<sup>277 Fed 989</sup>unreported), in all of which cases the Dunkleys gave testimony upon crucial points involved here contradictory to their testimony in the case at bar.

Under the unanimous decisions of all the courts, the burden is upon respondent, under the circumstances shown in this case, to affirmatively establish by the most clear, cogent and convincing evidence the date claimed prior to the Grier anticipation.

Our contention is that even ignoring the affirmative testimony adduced here in the impeachment of the Dunkley story, the case made by plaintiff is insufficient under the authorities. Certainly if the mass of oral and documentary proof offered by the defendants is given consideration, the inadequacy of plaintiff's proof under the decisions is inevitable.

For the court's convenience, we include a brief resume of the cases applicable, it being borne in mind that the proof of Dunkley's date of invention rests almost wholly in the testimony of himself and his son. As to such testimony the remarks of the court in *Eck v. Kutz*, 132 Fed. 763, in a case similar to the case at bar, are appropriate:

"But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say-so of the father and son, without any corroboration or convincing circumstances, which hardly fulfills the

high degree of proof required when the date of an invention is material in order to escape anticipation."

In addition to their natural bias, these witnesses, Dunkley and son, show themselves utterly unreliable when they repeatedly, in answer to questions involving vital matters concerning their machines, take refuge in such expressions as "I could not say" and "I do not remember." In the brief of defendants-appellees in this court, Equity No. 3316, at pages 292-303, there will be found eleven pages of such answers by these two witnesses, collected from their testimony, with appropriate references to the pages in the record where the same may be found.

In light of the authorities hereinafter cited, it will only be necessary in our opinion for the court to read these eleven pages of testimony to demonstrate that the Dunkleys have not produced that "clear and convincing" proof necessary to carry back the date of their invention prior to an established anticipation.

It will be noted in the cases that follow that in many instances the lower court sustained the patent, only to be reversed by the appellate court upon the very ground urged here. (*Italics*, unless otherwise indicated, are ours.)

THE SUPREME COURT OF THE UNITED STATES lays down the rule in the case of *Clark Thread Co. v. Willimantic Linen Co.*, 35 L. Ed. 521, 140 U. S. 481, that the patentee's evidence given for the purpose of "carrying back" his date of invention is subject to

the "gravest suspicion." In that case, the lower court had sustained the patent. Holding that the burden of proof had been shifted to the plaintiff by the introduction of a publication antedating plaintiff's application, the court adds:

"No person accustomed to weighing the credibility of human testimony can fail to perceive the stress under which this evidence was given.  
\* \* \* We feel bound to put this *strict construction* upon the *patentee's evidence* because such testimony given for the purpose that this was is naturally subject to the *gravest suspicion*, however honest and well intentioned the witness may be."

The decree of the lower court was reversed, the Supreme Court holding that the testimony of the patentee did not meet the burden of proof.

The reasons for applying this rule are ably set forth by Judge Coxe in the leading case of *Thayer v. Hart*, 20 Fed. 693.

The court expresses the rule to be applied in language which has been widely quoted and approved in a multitude of later cases.

"This date" (of anticipation) "being fixed, the burden was transferred to the complainant to satisfy the court by proofs as convincing as that required of the defendant that his invention preceded theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made per-

fect accuracy well nigh impossible, where an event, not deemed important at the time, has been crowded from the memory and obscured by the ever varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it.

“The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal; nothing must be left to speculation or conjecture.”

Indeed, the inducement to falsify is far greater to the patentee than to the anticipator having an unpatented device, for the patentee if successful will be able to exact as a royalty from *all* infringers a sum correspondingly in excess of what any one infringer would have to pay.

In the case of *Thayer v. Hart*, *supra*, a number of witnesses were called by complainant, and the circumstances relied upon by complainant were as follows:

Application for patent was filed December 20, 1877. The date of invention was asserted as of October, 1876. According to complainant's story, during his absence at the Centennial Exhibition in October, 1876, on which occasion his wife and child accompanied him, the firm of Hubbs & Klein left an order with his forewoman for five gross of “Chancellor shields” with pins attached. On his return, in order to avoid the expense of purchasing the pins then in the market, he com-



menced experimenting with a common pin and succeeded in making the patented invention. A shield and pin precisely like the defendant's device, alleged to have been made shortly after this time, was produced in evidence. (Just as Plaintiff's Exhibit No. 10 is produced here.) Later orders were also filled, including one from Anson Pitcher of Boston. The pliers and other tools used in bending and fastening the pins, and a memorandum book of one of the workwomen in which appears an entry in complainant's handwriting under date of October 28, 1876, alleged to refer to the "Chancellor shields" in question, were also exhibited to the court.

(In the case at bar, no documentary evidence of any kind in anywise relating to the issue and bearing date prior to October 23, 1903, is introduced, and the document of October 23, 1903, refers to Dunkley's first experimental machine, which had then just been completed and tried out.)

Additional circumstances alleged are the removal of complainant's place of business from Walker street to Center street, very soon after certain products were turned out. Testimony in behalf of defendants showed uncertainty as to these corroborating circumstances.

Apparently a number of witnesses were called in behalf of complainant, but the court holds, in language peculiarly applicable to the case at bar, that the complainant

"failed to bring himself within the rule adverted to \* \* \* The witnesses were testifying to events which took place six and seven years be-



fore. They certainly are mistaken as to some of them. Why may they not, without any wrongful intent, have mistaken the year also?" \* \* \*

"It is sufficient to say that no one of the principal circumstances relied on by the complainant is free from perplexity. Either its own date is uncertain, or there is difficulty in connecting it with the invention. It would be idle to assert that all this does not create the doubt which the authorities hold must be absent from the mind of the court."

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT lays down the rule that the burden of a patentee who is attempting to carry back his date of invention prior to an established anticipating device is equal to that placed on the anticipator, to-wit, proof "beyond a reasonable doubt."

*Dey Time Register Co. v. W. H. Bundy Recording Co.* (C. C. A., Second Circuit), 178 Fed. 812, was an appeal from a decree dismissing the bill in a suit for infringement of letters patent issued to John and Alexander Dey for improvements in time recorders. The lower court based its dismissal upon non-infringement. The decision of the court of appeals, based upon an entirely different ground (one not urged in the court below), after a review of the entire evidence, is of much stronger import than a mere affirmance of the trial court. Application for patent was filed November 15, 1904; it being shown by record evidence that the International Time Recording Company had shipped

an automatic machine September 12, 1904, the burden shifted to complainant.

Alexander and John Dey, patentees, both testified fully and circumstantially, as did their witnesses, Sanders and Wendel, the mechanics who performed the actual work of perfecting and manufacturing both the hand and the automatic two-color ribbon devices under instructions from John and Alexander Dey. All of these witnesses fixed their dates by various events, such as the arrival of Alexander Dey from Scotland and the removal of their factory in January, 1904. All four witnesses testified in detail and the Court of Appeals characterized their testimony as "entirely honest."

The story of these witnesses was that directions were given by the Deys to the mechanics, Sanders and Wendel, for the building of the two-color ribbon hand-operated device, in August or September, 1903; that work was begun in September, 1903, and that the machine was completed the latter part of October, 1903; that prior to the completion of this machine, instructions were given to Sanders and Wendel for the building of the automatic device in suit, and the same was constructed by them and completed in January, 1904, and that it was shipped out in February or March. There was no direct contradiction of this evidence, and the story as to the automatic device in suit stood substantially unimpaired. Doubt, however, as to the time of the making of the hand-operated machines was created by the introduction in evidence of correspond-

ence of the Dey Time Register Company and the American Type Founders Company. The court thereupon comments:

“It is quite apparent that the witnesses are astray as to the dates when the first or hand-operated machine was perfected, and it is certainly not unreasonable to suppose that the same witnesses, testifying from memory only, may also be astray as to the date when the first Dey automatic shifter was perfected. The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that *convinces beyond any reasonable doubt*. \* \* \*

“There is nothing in this case to suggest any fabrication or attempted coloring; but the human memory for dates is often inexact, and it is a fair rule which lays the *same burden on either side* which seeks to antedate an occurrence the time of which is established by a trustworthy record. There is no proof that any records of complainant have been lost by fire or other mischance, and, since none are produced to corroborate the contention that it had perfected the automatic ribbon shifter earlier than September 12, 1904, we are of the opinion that the defense of prior public use by some one other than the inventors is established.”

In the case at bar plaintiff claimed that its records had been destroyed by fire, but in subsequent litigations they have admitted that this was not true and that they have possession of the records.

A comparison of the Dey Time case and the case at bar may be helpful:

DEY TIME.

John and Alexander Dey, active heads of complainant's business, principal witnesses for complainants and alleged inventors.

Sanders and Wendel, employees of complainant, corroborate the Deys.

The Deys name the men who made the device in question, Sanders and Wendel.

The testimony of complainant's witnesses not contradicted by the testimony of other employees of complainant.

Complainant's witnesses were mistaken as to the time of making of prior hand - operated machine and therefore held discredited as to time of making automatic machine.

CASE AT BAR.

S. J. Dunkley and son Melville, active heads of complainant's business, principal witnesses for complainant; S. J. Dunkley, alleged inventor.

Schau and Verhage, employees of complainant, are offered to corroborate Dunkleys, but their testimony is contradictory and not in accordance with previous testimony given. The Dunkleys "cannot remember" who made their machine.

Testimony of complainant's witnesses contradicted by scores of witnesses employed by the Dunkleys during the periods of time involved and by those who actually made the machines in question.

The Dunkleys admit false statements as to time of installation of hand peeling table; admit false statement to the effect that the Clarke Engine and Boiler Company letter of

April 21, 1903, referred to a lye tank; admit false statement to the effect that their records were destroyed by fire; have materially changed their testimony as to the percentage of peaches peeled by lye machines in 1903; and have been guilty of numerous other contradictions.

No documentary records produced and their absence not accounted for.

Letters between Rockwell, complainant's sales agent, and the International Company, created a doubt as to the date of making the hand machine.

No documentary records produced and their absence not accounted for.

Correspondence between Dunkley and the Norton brothers, his financial backers, conclusively proves that Dunkley did not make his machine until a year later than the date claimed. (The Dunkleys testified in the case at bar and in subsequent litigation that there were only two machines made, including Plaintiff's Exhibit 10, prior to November 4, 1904. The Dunkley-Norton correspondence shows that the second machine was commenced in November, 1903, and completed in the spring and summer of 1904, and operated for the first time in the summer of 1904, the only other machine being Dunkley's experimental model, Exhibit No. 10 herein. Dunkley either did not make his



model machine prior to the fall of 1903, or there was lack of diligence. *Twentieth Century Machine Co. v. Loew Mfg. Co.*, 243 Fed. 382.)

A remarkably parallel case is the very recent one of *Barber v. Otis Motor Sales Co.*, 271 Fed. 171, C. C. A., Second Circuit, February 9, 1921. Appeal from the District Court for the northern District of New York, from decree for complainant, holding infringement. *Reversed.*

Patent applied for February 24, 1902, issued February 7, 1907, to William Barber. This suit was commenced in May, 1915, and after final hearing a decree was entered for plaintiff, holding infringement (231 Fed. 755), and later affirmed on appeal. (240 Fed. 723.)

Shortly thereafter plaintiff brought suit upon the same patent in the District Court for the Southern District of New York against Reo Motor Car Co. (245 Fed. 938.) At the final hearing, the district judge held the patent void for anticipation and dismissed the bill. No appeal was taken from this decree.

Thereupon, proceedings were had in the District Court for the Northern District of New York and in the Circuit Court of Appeals, for the recall of the mandate and a reopening of the case in the court below. After "further hearing" upon an amended answer setting forth matters not theretofore called to the district judge's attention, the district judge ad-

hered to his previous ruling, decreeing infringement. From this interlocutory decree defendant appealed.

The Circuit Court of Appeals examined the prior art, and held that plaintiff must establish by proof beyond a reasonable doubt his date of invention prior to the dates of certain established anticipations. To thus carry his date back, plaintiff offered his own testimony, corroborated by his wife, the pattern-maker and the iron moulder who aided in making the machine. The Court of Appeals held the proof insufficient as a matter of law, although the story stood apparently undisputed. The court states the rule as follows:

“One who seeks to carry the date of invention back of a date of an anticipating patent assumes the burden of proof, and must establish the earlier date by evidence so cogent as to leave no reasonable doubt in the minds of the court that the transaction occurred substantially as stated. \* \* \* The rule as to the burden cast upon the appellee in endeavoring to fix such a date is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt.”

Some of the points of comparison between the case at bar and Barber v. Otis:

### Facts.

#### BARBER V. OTIS.

Patentee shifted his testimony as to date of his preliminary sketches from 1899 to 1897.

#### CASE AT BAR.

Patentee shifted his testimony as to the making of his first experimental machine from 1903 to 1902.

Barber "gave no satisfactory excuse" for his change in testimony.

Patentee testified in one suit that the State street shop antedated the invention, and in another suit to the contrary.

Barber gave "inconsistent testimony" as to matters used for fixing dates.

Barber's testimony as to the history of his invention

The Dunkleys claimed a refreshment of recollection from a certain letter—now admitted by them to have no bearing whatever.

Melville Dunkley, son of the inventor, and plaintiff's principal witness, testified in the case at bar that records were burned, and in the Pasadena suit admits to the contrary.

The Dunkleys gave inconsistent testimony as to number of machines made, where operated, who may have made them, amount of peaches peeled by lye in 1903, and as to many other important particulars. Melville Dunkley in the case at bar denied the existence of long hand-peeling table in 1903; in subsequent litigations he admits it. A letter dated April 21, 1903, referring to a tank, is introduced in the case at bar, with the assertion that the same referred to a lye tank for use with Dunkley's invention. In later litigations it is admitted that this letter referred not to a lye tank but to a *soup tank*.

The testimony of the Dunkleys upon vital mat-

was apparently clear, detailed and circumstantial.

ters was a succession of "I don't remember" and "I couldn't say."

Wife Testifies.

Son and sister-in-law testify.

Barber gives poverty as reason for not filing application for patent sooner.

Dunkley gives no reason for delay.

Barber introduces testimony of pattern-maker and iron moulder.

Dunkley produces no testimony of materialmen or mechanics; on the contrary, the defendants in the Pasadena and New York cases introduced testimony of mechanics and materialmen showing that patentee's device was made a year later than date claimed.

Testimony in Barber case held insufficient in the absence of impeaching testimony for defendant.

The Dunkley story is of itself insufficient, and self-contradictory; it is utterly destroyed by the testimony of the men who made his machines and of scores of former employees and other reputable witnesses who saw them in construction and operation.

### Remedy.

Appeal from District Court, decreeing infringement, and affirmance by C. C. A.

Appeal from District Court, decreeing infringement, and affirmance by C. C. A.

Subsequent suit in Southern District of New York against another defendant resulting in decree for defendant.

No appeal from decree of dismissal in Southern District. D e c r e e becomes final.

After decree in Southern District in Barber v. Reo had become final, mandate is recalled by Circuit Court of Appeals and rehearing granted by reason of the decree in the Southern District and new matters there shown.

The court below, after rehearing granted, adhered to its former ruling holding infringement.

After a re-hearing in the court below, and a re-ad-

Subsequent suit in Southern District of California against another defendant, resulting in decree for defendant.

Decree in Southern District appealed from and affirmed by Circuit Court of Appeals. *Certiorari* denied by Supreme Court. Decree becomes final.

We are asking a rehearing by reason of the decree in the Southern District and new matters there shown and by reason of this court's affirmance of that decree.

After suggesting that the court had no jurisdiction to entertain the motion, the court below proceeded to hear and deny a motion to reopen "on its merits." (The court was correct in stating that the motion should have been made in this court and not in the court below, in view of more recent decisions of the Supreme Court of the United States.)

This court should grant the petition here upon the



herence of that court to its former ruling decreeing infringement, the Circuit Court of Appeals reversed the lower court on the facts, holding them insufficient to carry the inventor's date back prior to the established anticipation.

See also *Westinghouse Elec. and Mfg. Co. v. Catskill Ill & P. Co.*, C. C. A., Second Circuit, 121 Fed. 831, in which a decree of the lower court holding certain patents issued to Nikola Tesla valid and infringed, was *reversed*, the court stating:

“Complainant has failed to comply with the fundamental rule that the best evidence of which the case is in itself susceptible must be produced.”

Dunkley in the case at bar did not produce any records or account for their absence.

See also *New England Motor Co. v. B. F. Sturtevant Co.* (C. C. A., Second Circuit), 150 Fed. 131, in which the lower court was *reversed* on the ground that the court was “not satisfied that the evidence is sufficient to anticipate the anticipation,” and that “the burden was upon the complainant” to “furnish the court with convincing proof.”

THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, in the case of *Hummicutt Co. v. Gaston Co.*, 218 Fed. 176, reiterates the rule as to the shifting of the burden of proof to the patentee, and remarks the high degree of evidence required. In that case, letters were introduced which were “ambiguous in their ref-

erences; but even if they plainly referred to the double grader now in question" the court held that the patentee would not be entitled to a time prior to their date.

The Dunkley-Norton correspondence in the case at bar, referring to a peeling device, is all of date *after* the Grier use, and therefore insufficient under the authorities. Judge Trippet held that he was convinced "beyond a reasonable doubt" that Dunkley did not make his first machine until the fall of 1903.

The CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, in *National Machine Corp., Inc., v. Benthall Machine Co.*, 241 Fed. 72, *reversed* the lower court upon the ground of the inadequacy of the proofs by complainant to anticipate the anticipation. The Circuit Court of Appeals held that *proof of an established anticipation cannot be overcome by oral testimony*, but that proof beyond a reasonable doubt is required of the patentee.

"If there be added to this (possibility of being mistaken) a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more seriously impaired. This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court that the transaction occurred substantially as stated.' (*Deering v. Winona*, 155 U. S. 286.)"

"This quotation is very much in point as respects complainant's testimony, inasmuch as the

witness Evans was its foreman, and Cockes testified that he was an agent of the same company."

In the case at bar, complainant's witnesses, Schau and Verhage, are still in its employ. The testimony is all oral. In the Benthall case there were other witnesses for complainant, but the showing was held insufficient under the rule.

The CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT has likewise laid down the rule that to carry back the date of an invention plaintiff's proofs must be established "beyond a reasonable doubt." In the case of *Columbus Chain Co. v. Standard Chain Co.*, 148 Fed. 622, affirming the decree of the lower court dismissing the bill for infringement, anticipation was shown as of December 27, 1894, to avoid which complainant produced the testimony of Daniel Carroll, the inventor, his brother, Edward Carroll, James Crooks and George N. Mettle, all of whom testified that they had worked upon the device. Both of the Carrolls testified that the punch (device in question for making links of uniform length) was made by Edward Carroll at the direction of the patentee not later than September, 1893. This was a crude device, and a pattern-maker, James Crooks, during the winter of 1893-4, made a pattern. Thereafter, in the summer or fall of 1894, he had George N. Mettle a machinist, plane a channel in a steel punch. Crooks and Mettle testified that they made the wooden model and did work on the tool respectively in the fall or winter of 1894. Attention is also called to the delay of the patentee in

filing his application, the court stating, "the delay in applying for a patent seems unreasonable."

In the case at bar, according to plaintiff's story, over two years' time was allowed to elapse after the alleged building of the machine and successful try-out. Plaintiff produced no witness who had worked upon the machine, while a large number of witnesses were produced by defendants in the Pasadena and California Packing Corporation cases who either helped to construct the machine or saw it under construction, and who completely impeached the Dunkleys in their testimony as to the date of their alleged invention.

The CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, in the case of *Twentieth Century Machinery Co. v. Loew Mfg. Co.*, 243 Fed. 373, has also expressed the rule as requiring "*unequivocal and convincing proofs*" on the part of complainant.

To avoid established anticipation, patentee endeavored to carry back the date of his invention. In addition to his own recital, he produced a sketch dated February 1, 1902, and the testimony of a draftsman that it was "presented by the inventor to me; this sketch or one similar to it." It does not appear that this testimony was controverted. Also, entries in the books of the patentee's solicitor showing payments to him beginning March 3, 1902, and ending April 2, 1902. All of this evidence was held insufficient corroboration of an earlier date than that of the first application, April 10, 1902.

The anticipating device was unpatented, the court holding that such an anticipation may be shown with



the same effect as a patented one, and can be carried back to the date of its conception, under sections 4886 and 4920 of the Revised Statutes, citing *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation*, 166 Fed. 301 (C. C. A. 1).

See also *Michigan Central R. Co. v. Cons. Car Heating Co.*, 67 Fed. 121 (C. C. A., Sixth Circuit, Judges Taft, Lurton, Severens), in which a decree of the lower court holding infringement was *reversed* on the ground that the patentee had not sustained his burden of proof to show by "clear and unequivocal" evidence that his invention antedated an established anticipation.

THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT likewise lays down the same rule with reference to the high degree of proof required of the plaintiff under the circumstances here involved. In the case of *Consolidated Ry. Co. v. Adams & Westlake Co.*, 161 Fed. 343, the lower court had held a patent issued to one Kennedy valid and infringed. On appeal to the Circuit Court of Appeals, this decree was *reversed*.

The following excerpts show how strictly the rule under discussion is applied against a patentee:

"While it is true that drawings are introduced on behalf of the patentee, exhibiting the suspension means, with testimony which tends to fix their date, as stated in complainant's brief, 'somewhere between July and the last of October, 1901,' each exhibit rests on the recollection and credibility of witnesses for the alleged date, at best stated indefinitely; \* \* \* An exhibit 'rough sketch,'



in a memorandum book of a witness (Sexton), is introduced, as tending to show disclosure of the patent-device to this witness, by Kennedy, about November 17, 1901. \* \* \* The exhibits referred to, however, are not so authenticated in date, consistently with other facts, that they can be accepted, in our view of the circumstances, as satisfactory confirmation of the testimony of the patentee that he had perfected and communicated the device of his patent, prior to the alleged conception by Sherbondy, which was reduced to practice so long in advance of Kennedy's application.

"\* \* \* nor does it satisfactorily appear from the testimony that any portions of equipment, specially adapted for the device of this patent, were actually made by Kennedy or his company prior to 1902—as the shop orders in evidence are equally referable to the earlier devices. \* \* \*"

Although patentee produced sketches and shop orders which were referable to the alleged invention, the court disregarded them, as they were equally referable to other times and devices. In the case at bar Dunkley produced no shop orders or records of any kind equally or otherwise referable to anything involved in this suit of a date prior to the established date of Grier.

The CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, in the case of *Torrey, et al., v. Hancock*, 184 Fed. 61, in *reversing* the lower court, likewise lays down the rule that the burden is on the complainant to establish a date of invention prior to an anticipation "by satisfactory and convincing proof." The court holds that proof which is "contradictory, vague and

general” is unsatisfactory. On pages 212-338 of brief of defendants-appellees, on file herein in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, Eq. 3316, is a detailed analysis of plaintiff’s proofs. To say that these proofs are contradictory, vague and general is expressing the matter mildly.

In the Hancock case the patentee had applied for a patent “about one and one-quarter years after the alleged anticipating device had been put into use.” In the case at bar the anticipation was established a year and a half prior to complainant’s application. In the Hancock case the complainant failed to produce the best evidence obtainable. In the case at bar complainant failed to produce any records, either of its own or of other concerns who furnished parts of the alleged device, or caustic soda, or other supplies for its operation upon a commercial scale, records readily available if their story is true.

Other enlightening decisions by various courts reiterating the universal rule are:

*Wheaton v. Kendall*, 85 Fed. 666, 672, N. D. Calif.

*Corrugated Paper Patent Co. v. Paper Working M. Co.*, 237 Fed. 380.

*Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. L. Co.*, 108 Fed. 221.

*American Graphophone Co. v. Gimbel Brothers*, 234 Fed. 344.

*Amer. Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 70 Fed. 986, holding that “full, unequivocal and

*convincing*” evidence is required of plaintiff. Comment is made upon the fact that the patentee at a time later than his alleged conception remained “absolutely mute so far as any invention or disclosure by him was concerned.” This fact is comparable to the failure of Dunkley to communicate to his financial backers, the Nortons, the alleged fact that he was using a lye peeling machine successfully during the season of 1903.

*Evans v. Associated Automatic Sprinkler Co.*, 229 Fed. 1007. In this case the inventor had a sketch dated 1913 and he endeavored to convince the court that the sketch was made about November 21st, 1912. The court asks, “If he then could not give an earlier date than January, 1913, how can we now find the date was November 21st?” This situation is parallel to the disclosures of Dunkley and his witness in the interference proceedings in 1910, wherein they testified that Dunkley’s first experimental machine was made in July, 1903.

### **Case at Bar as Now Made Out by New Evidence.**

The story of the alleged Dunkley invention, as made out by evidence discovered and secured since the trial at San Francisco, and independent of all disputed or questioned testimony there, is very briefly and in its more salient features, as follows. (The court will observe that the facts are established independently of Stewart Campbell’s testimony. Before reading this, we suggest that the court read the substance of the Dunkley story as given at San Francisco. It is stated briefly in the petition at pages 14-17.):

In South Haven, Michigan, there were in 1903 and before, two canneries, that of Samuel J. Dunkley and that of William McEwing. The Dunkley cannery was located just north of the railroad tracks. The main factory room ran parallel to the tracks. Originally this room was only 100 feet in length and 32 feet in width. In the winter of 1901-2, the old building was extended 120 feet toward the east. The new part was the same width as the old. In 1903 the office of the cannery was in the basement. The engine room also was there.

NOTE. If references to the record were made for all the testimony to establish the facts here stated, it would unduly lengthen this statement. The greater part of the matter was entirely unquestioned. Generally as to such facts, no references will be attempted, and the references will be confined to facts dealing the most directly with the construction and use of the lye machines. Such references as are made are not intended to be exclusive.

In 1902, peaches had been peeled by women sitting at small tables scattered about this long, narrow factory room. In preparation for the 1903 season, however, a decided change was made in the arrangement for handling peaches. An elaborate conveyor table for the peeling of peaches by hand, 150 feet in length and (with the platform for the seats) about 11 feet in width, with a conveyor belt running along the center, was constructed and installed during the summer of 1903. (L. A. Rec. 2454-7, 2507-8, 1175, 2076, 2109, 2820, 2373, 2775.) Lumber for this table was furnished by the Noud Lumber Co., of South Haven, between July 6 and August 20, 1903. Underneath this table and along each side was a galvanized trough. This was furnished by Miller, of South Haven, on July 23, 1903. (L. A. Rec. 2646, 1448-9.) Along



each side of the table was a platform wide enough to permit of chairs being placed there for women to sit in. About August 20, 1903, William Triece installed a row of electric lights along the ceiling over this hand-peeling table. (L. A. Rec. 2774-5.) Various witnesses saw the table in course of construction under the general supervision of Stewart Campbell. (L. A. Rec. 2454-7, 2507, 1907-8.) This table was built along the south side of the factory room, commencing at the east end. To the west of the table and substantially as a continuation thereof, there was constructed and installed a table with a moving slat top. This was 60 feet in length, so that the two tables occupied all but a few feet of the entire length of the main factory room.

During the 1903 peach season, the entire pack of peaches was peeled *by hand* by women. Mostly they sat on chairs on either side of this table. As rapidly as they peeled a pan of peaches, it was inspected by one of two or three inspectresses who did nothing else except walk up and down behind the chairs of the women who were doing the peeling and inspect each pan of peaches, and if found satisfactory, emptied the peaches upon the conveyor belt and punched the ticket of the woman who had peeled them. (L. A. Rec. 2507-9, 3184-5, 2074-9, 2183, 2375-7, 2461-3, 1940, 1952-3, 1174, 1228, 2695, 2852-4, 2106, 2817-20, 2216-20, 2777-8, 2342-3, 2001-5, 2032 *et seq.*)

The foregoing improvements in the method of handling peaches in the Dunkley factory in the year 1903, besides being proven by the testimony of many wit-



nesses, were accurately described in an article entitled "Canning Factory Is a Busy Place," which was published on October 1, 1903, in the South Haven Daily Tribune. (Rec. on Appeal, p. 424.) The writer of the article, L. L. Crosthwaite, testified in the trial before Judge Trippet, and with this article to refresh his recollection, described with great detail and definiteness the arrangement of the factory room and the manner in which peaches were handled. (L. A. Rec. 2183 *et seq.*)

No peaches were peeled commercially by the lye process or brush machine in 1903. A large number of women who worked at this long table in 1903, and who, of course, would have noticed the presence of an entirely new method of peeling peaches, so testified before Judge Trippet. Some of these women worked for the Dunkley Company only in 1903. Among them were several extremely intelligent women who were inspectresses during that season. In addition to these women, there were a large number of other employes about the Dunkley factory in 1903 who testified to the same effect. (L. A. Rec. 3189-90, 2460-2, 2473, 1941-4, 1177-8, 2513-4, 2820, 2853-4, 2696, 2080-1, 2183-4, 2195, 2111, 2220, 2227, 2778, 2745, 2335, 2005, 2036-7.)

McEwing peeled peaches in a crude way by lye in 1902 and on. In the summer of 1903, Samuel J. Dunkley talked with his old friend, Van Nostrand, the druggist at South Haven, about the matter, who advised him that the lye peeling of peaches had been practiced in that vicinity as early as 1868. (L. A. Rec. 2330-1.) William Brunker was employed at the Dunkley factory

at South Haven only during the season of 1903. He was seen by various witnesses in the summer of 1903, experimenting with the effects of lye upon peaches. (L. A. Rec. 2377-80, 2791.) Dunkley again talked with Van Nostrand, and gave him to understand that he was going to build a peach-peeling machine, and asked him whether he had a catalogue showing cylindrical brushes. (L. A. Rec. 2341-2.) About August 1, 1903, Stewart Campbell, accompanied by someone else who has never been identified, came to the office of Riddeford Brothers, at Chicago, they being manufacturers and dealers in brushes (L. A. Rec. 1709), and explained to Riddeford, one of the partners, that he was intending to build a machine for the peeling of peaches, and discussed with Riddeford the kind of brushes which would do the work desired. (L. A. Rec. 1715-22.) Brushes were thereupon ordered and purchased by Campbell, the books of Riddeford showing in considerable detail the character of brushes purchased. (L. A. Rec., Def. Ex. 24, 25.) Campbell was seen by various employes about the Dunkley factory during September and October, working on the brush peeling machine, the framework of which was in evidence as Exhibit 10 in the San Francisco case. (L. A. Rec. 2459-60, 2463-4, 2840-1, 2106-8, 2121, 2381-5, 2378-80, 2795, 2336.) This model machine was built in the basement of the Dunkley factory near the engine room. Certain of the pulleys, boxes and gears for this machine were furnished by Edwin B. Mapes, who conducted the only machine shop in South Haven. His account book shows entries for materials furnished for

and work done upon the peach machine, the entries running from September 28 to October 6, 1903. (L. A. Rec., Def. Ex. 34.) Several tests of this machine were seen by various of the employes and other persons. (L. A. Rec. 2467, 2779-80, 2382-3; S. F. Rec. 602-3, 622.)

The Dunkley factory at South Haven was closed about October 29, 1903. (L. A. Rec. 4124.) About November 7, 1903, work was started at Kalamazoo on a new paring machine, as Dunkley wrote Norton to that effect on that date. (L. A. Rec. 4127.) As there were only two machines prior to November 1, 1904, namely, the model experimental machine and the three-line wooden frame commercial machine (S. F. Rec. 449, 500-1, 417; L. A. Rec. 2152-3, 2470-1, 1212, 2745-6, 1475, 1777, 2886, 2895, 2667-9, 2866-7), the new paring machine thus referred to must have been the second machine built, or the three-line commercial machine. A lye tank for this machine was ordered from the Clark Engine & Boiler Works at Kalamazoo, early in January, 1904, and delivered on January 30, 1904. (L. A. Rec. 2660-1.) Work was done for the Dunkley Company on this machine at the instance of Campbell by Buckley, at Kalamazoo (L. A. Rec. 2051), and at Decker's machine shop, work was done on it between March 8, 1904, and April 30, Decker's books showing this fact. (L. A. Rec. 280-3, 3032.) Louis Payne, a pattern-maker, did some pattern work for the machine in the spring of 1904. (L. A. Rec. 3043.) In March or April, the three-line brush machine, with the tank, generally called the "prevaricator" or "An-

anias," was shipped to South Haven (L. A. Rec. 4147), and the complete machine was set up in the main factory room on the south side thereof and toward the east end, the long table having been cut in two (L. A. Rec. 2151-2, 2468-70, 2664-7, 2881, 2842-3, 2956-60, 2387-8, 2781-2), and the easterly end thereof having been moved to the north side of the room. (L. A. Rec. 2667, 2079, 2843, 2859, 2387-8.) Many disinterested witnesses of the highest type testified to seeing the machine being set up at South Haven, and that it was a new machine. Scores of witnesses testified that 1904 witnessed the first commercial use of a lye machine. (L. A. Rec. 2151-4, 2165, 2468-7, 2664-7, 2884-6, 2842-3, 2856-60, 2867, 2387-8, 2823, 2830, 2781-2, 2786, 2804, 1181-2, 1220, 2553, 2079-80, 2092, 2193-4, 2196, 2108, 3060-1, 2745.)

Concurrently with the construction of this three-line wooden frame machine, there was being constructed a pitting machine which was also set up at the South Haven factory, but which apparently was not successful, and some changed designs became necessary.

About the opening of the peach season of 1904, Dunkley and Stewart Campbell had some difficulty, and Campbell left. (L. A. Rec. 2899, 2920.) William Triece thereupon took charge of the operation of the new machine, and continued to have charge of the same throughout the 1904 season. Hetherington, a new man who went to work at the Dunkley factory at about the opening of the peach season of 1904, apparently stepped into Campbell's shoes as head mechanic. He had a good deal to do with taking care



of the machinery. While considerable difficulty was experienced in running the lye machine, a large amount of peeling was done by it in the 1904 season. About October 2, 1904, an employe of Dunkley's patent attorneys at Chicago came to the factory at South Haven and made the drawings of this machine which furnished the basis of the patent application subsequently made. (L. R. Rec. 4166-7, 4068, 1472-3, 1140.)

In the winter of 1904-5, the design of the peach-peeling machine was substantially changed. It was found that a two-line machine was more satisfactory than a three-line; also, experience having shown that the lye would eat up the wooden frame (the three-line wooden frame machine has not been produced in evidence), iron frame machines were devised. (L. A. Rec. 2905; S. F. Rec. 417.) Hetherington, during the winter of 1904-5, had charge of building these new type of iron frame machines. (L. A. Rec. 2892.)

The foregoing is but the very skeleton of the story. An infinite variety of details are shown by the evidence. These details dovetail together in a very remarkable fashion. For illustration, Mapes, who ran the machine shop at South Haven, in identifying parts for the first or model machine furnished by him in the fall of 1903, pointed out that the shaft holes in certain boxes on Exhibit 10 (Ex. 11 in L. A.) must have been enlarged. (L. A. Rec. 2590-2.) Some days later, S. J. Dunkley gave testimony showing that the shaft holes had been enlarged some time after 1903 in connection with certain proposed experiments with the machine. (L. A. Rec. 4189.) The Dunkley-Nor-



ton correspondence, which came to light in the concluding days of the trial and after many witnesses had testified, verified an infinite number of details given by these witnesses. So convincing were the proofs that it is not strange that Judge Trippet, after hearing the witnesses testify, observing their demeanor, and following the fall of the trial, felt convinced "beyond a reasonable doubt" that Dunkley did not build his first machine until the autumn of 1903.

#### **New Matter Set Up in Paragraph IV of the Petition —Its Materiality and Effect.**

Enough has been said to indicate the difficult and somewhat embarrassing situation that confronted the plaintiff in the trial at San Francisco, upon proof being made of the Grier dates and the burden of proof being shifted (by this and other evidence) to the plaintiff to anticipate these dates. In doing this, the plaintiff was very seriously handicapped by the fact that its main witnesses, S. J. Dunkley, the inventor, and M. E. Dunkley, his son, had each testified in 1910 in a proceeding in the Patent Office that the first or model experimental machine had been built in July, 1903. (The lye tank was not involved in the interference proceeding, not being within the issues. All references in that proceeding are to the brush or spray part of the machine, without the lye tank. See Int. Rec. pp. 57, 486-7, 364-6, 419-21, 443-44, 458, 463-7, 475.) Obviously, some *plausible and convincing excuse or explanation* was necessary to justify a departure from

this testimony and the setting back of the date so as to anticipate Grier.

The *effective* explanation made for abandoning the July, 1903, date and fixing the date of this first or model experimental machine as the fall of 1902, is best expressed in the words of John H. Miller, counsel for the plaintiff, in his brief filed in this court on the appeal from the interlocutory decrees here sought to be reopened. Referring to the Dunkley testimony in the Patent Office proceedings and the subsequent change therefrom, he said (See testimony Melville Dunkley, S. F. Rec. 465):

“Since then they have unearthed the Clark letter of April 21, 1903, showing that the lye tank was built in April, 1903, and this letter refreshed their recollection of the transaction so as to enable them to now state that the framework and spray part of the machine had been built before the lye tank, and in following the matter back they now recollect that the framework and spray part were built in 1902. Until this Clark letter was unearthed, the Dunkleys were not sure in their recollection that the framework was built in 1902, although they were sure that it was in existence as early as July, 1903; therefore in the Patent Office proceedings they were justified in fixing the date at least as early as July, 1903. But the Clark letter changed the situation somewhat and proved to them that the lye tank was built in April, 1903, and as the spray part was built and tested without the lye tank, it necessarily was built before April, 1903. In other words, the production of the Clark letter enabled the Dunk-

leys to remember that the spray part of the machine was built in 1902, and that a complete machine was installed with a lye tank added in July, 1903." (Reply brief of appellee on appeal, S. F. case, pp. 55-6. See also argument before Judge Van Fleet, S. F. Rec. p. 652.)

And this brings us to the first item of new matter, the so-called

### 1. Clark Letter Incident.

This so-called Clark letter was the only "documentary" proof offered by the plaintiff at San Francisco. The testimony given at the San Francisco trial in regard to this letter is referred to in the petition (Pet. pp. 15-6). It is clear, striking and most convincing in character. It must have appealed strongly to the trial judge and to this court on appeal. Mr. Miller was fully justified in the statements he made.

In the Los Angeles trial, however, it developed that Melville E. Dunkley was no longer prepared to say that this letter and the invoice referred to therein had to do with a lye tank. (Pet. pp. 19-20; L. A. Rec. 1283-1288.)

The fact is, as was definitely proven at the Los Angeles trial, that this particular tank covered by the invoice referred to in the Clark letter was not a *lye* tank at all, but was a *soup* tank, and was never at South Haven, but was installed and used at the Kalamazoo factory of the Dunkley Company. (Pet. 47-9. L. A. Rec. pp. 2600-2626. 2453-4, 2472-3, 2485-86.)

Thus the *excuse and explanation* for setting back the date of the construction of this series or model ex-

perimental machine from July, 1903, the date given in 1910, in the Patent Office, to the autumn of 1902, is completely destroyed, and the *only documentary proof of the 1902 date claimed eliminated.*

But this is not all. Obviously, in view of the burden of proof resting upon the plaintiff in carrying back the date of the Dunkley invention to a point some two years prior to the date of the patent application, *documentary proofs* must be offered or their absence must be explained. What of the books and records of the Dunkley Co. showing purchases of lye or parts for the lye machine? Why these were not produced was also stated by Mr. Miller in his brief in this court as follows:

“Another criticism made against the Dunkleys is that they produced no written records. But counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912 the Dunkley cannery was destroyed by fire and their records were lost.” (Reply brief of appellee on appeal, p. 59.)

This brings us to the second item of new matter:

## **2. Books and Records Not Destroyed.**

The testimony given at San Francisco in explanation of the non-production of books and records is referred to in the petition (Pet. 16). It is direct and unequivocal (S. F. Rec. 444-5). Again Mr. Miller was fully justified.

No longer, however, is this claim as to destruction of books and records made. At the Los Angeles trial



it was completely abandoned. It was expressly stipulated that all of the old books and records of the original Dunkley Company were delivered to the San Francisco plaintiff in 1910. No longer was it claimed that any records were burned when the factory at South Haven burned in 1912. An *unexplained* failure to produce these books and records at the San Francisco trial would have weakened the plaintiff's case there in a very substantial way, and would have been a powerful circumstance weighing against the accuracy of the somewhat startling testimony of the two Dunkleys there. Grier's books had shown purchases of lye and of parts for his machine. The Dunkley books, if produced, would undoubtedly have shown the same—but of what date?

*It was not incumbent on the petitioners herein to prove at the trial that Dunkley invented his machine after Grier; it was for the plaintiff there, by clear and direct and convincing proof, to establish that Dunkley was before Grier.*

The descriptions already given of the long hand-peeling table constructed and installed in the summer of 1903, and of its use during the 1903 canning season, will give an idea of its significance. Of this apparatus, Judge Trippet states (261 Fed. 207):

“The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of the plaintiffs' case.”

The *sine qua non* of plaintiff's theory is that nearly all of the peaches in 1903 at South Haven were peeled



by lye machine. And this brings us to the third item of new matter, the so-called

### 3. Long Table Episode.

Judge Trippet continues:

“The plaintiffs claim that a complete and perfect machine, namely, the second machine, was operated during the peach season of 1903, where this long table stood. Plaintiffs further claim that practically all the peaches of the season of 1903 were peeled by the second machine. Several photographs, which witnesses testify were taken in 1903, are in evidence. One of the photographs is this particular long table, with the women sitting at it peeling peaches by hand machines and knives. The photograph of the peaches on the table shows that the peaches were peeled by a knife or hand machine, which made little ridges around the peach. When a peach is peeled by lye, it is perfectly smooth, and such ridges do not appear. This is inconsistent with the theory of plaintiffs’ case. One of these photographs contains a picture of a singular circumstance, tending to show that the picture was taken in 1903. This circumstance is that the picture itself shows a bouquet, containing the date of a party held by the employes of the factory in 1903. There can be no doubt in anyone’s mind but what that picture was taken in 1903. It shows many of the same people that sat at the long table peeling peaches by hand during that year.”

It may be added that at least three of the women in the picture shown to be peeling peaches by hand were proven by the Dunkley payrolls and other docu-

mentary proofs to have worked at the Dunkley factory in 1903 *only*.

The photograph (L. A. Rec., Defendants' Exhibit 3-A) and the testimony further show that this long table with the platforms for seats occupied one-half of the entire floor space of the peeling room. This room was only thirty-two feet wide, and allowing space for the row of support posts down the center, there was left but an aisle not occupied by this table of approximately fifteen feet only, a portion of which was required for the trucking of the fruit to the peelers. Anyone who has seen a canning factory of that period will realize that the remainder of the space was required for fruit, boxes, paraphernalia, etc., as testified to by many witnesses. That a lye peeling machine of either commercial or experimental proportions could have been installed in the aisle referred to in immediate proximity to all of these women shown in the photograph and not one of them be cognizant of it, exceeds absurdity. In the interference proceeding the Dunkleys claim that all of their peaches were peeled by a lye peeling machine in 1903; in the case at bar, it was claimed that seventy-five per cent were so peeled; and in the Los Angeles case a "large percentage." The smallest estimate given by any of their witnesses in the Los Angeles case was fifty per cent. Could it be possible that as many peaches could be run through a lye peeling machine located in the same narrow room and immediately next all these women shown in the picture and be totally unobserved by any of them? It will be noted that the ceiling is very low—

only eight feet high, according to the witnesses. Is it possible that a lye peeling device which employs boiling caustic and which emits clouds of pungent steam, could have been operated alongside of these women and every one of them be totally oblivious to it? Not a single one of these women was produced as a witness for Dunkley; on the other hand, a large number of them appeared and testified that no such machine was operated there in 1903, and that they saw no such machine.

In the San Francisco trial, S. J. Dunkley's testimony in regard to the long hand-peeling table was evasive. (S. F. Rec. 491.) Melville Dunkley, however, who was the principal witness there, flatly denied its existence in 1903, placed it in 1904 and described it as an inspection table and pictured it to conform to the half of the long table as it was finally readjusted and actually used in 1904. (Pet. 17.)

"A. The peeling table, according to my best belief, was not put in until 1904. \* \* \*

Q. How long was this peeling table?

A. It was not a peeling table, it was an inspection table.

The Court: The witness has stated that twice, that it was not a peeling table, as you have described it, but it was placed there in 1904 and had an endless conveyor on it and was for inspection purposes. He said no peaches were ever peeled on it." (S. F. Rec. 443, 452, 454.)

Stewart Campbell testified it was constructed and used in 1903, but his testimony was rejected. Hence the date of the table stood as 1904.

At the Los Angeles trial, each of the Dunkleys definitely admitted the existence, location and use of this long table in 1903, substantially as hereinbefore outlined.

The picture also shows this hand-peeling apparatus to have an elaborate, expensive and permanent installation. If the story of Dunkley be true, that Plaintiffs' Exhibit 10 was made and tried out on late peaches in 1902, and a lyeing machine of commercial proportions was made in the spring of 1903, showing Dunkley's faith in his alleged invention, how did it happen that Dunkley installed this elaborate conveyor table for peeling by hand as late as August in that year? The admissions which the Dunkleys have been forced to make in court since the trial are "utterly inconsistent" with plaintiffs' theory.

Perhaps the effect of the foregoing changes in testimony by the Dunkleys may best be illustrated by imagining the suppositional situation of one of Your Honors having been the trial judge at San Francisco, and, after having listened to the testimony and been somewhat troubled by the question of the dates as between Grier and Dunkley, concluded that on the whole case the plaintiff there had sustained the burden of proof, and had notified counsel and the parties to be present for the oral announcement of the decision, and that thereupon Melville E. Dunkley had arisen in the court room and addressed Your Honor somewhat as follows:

"Your Honor, I have been thinking over my testimony. You will remember what I testified



to about the Clark letter of April 21, 1903, and how it referred to a lye tank which was for the first machine, and refreshed my memory and enabled me to say that the 1903 date of the construction of the first machine which I gave when I testified before the Patent Office was wrong, and that, as a matter of fact, the first machine was built nearly a year earlier. Well, I am not sure that that letter and the invoice referred to in it had reference to a lye tank. The invoice may have been for something else—perhaps a soup tank.”

“Another matter, I was mistaken about our books having been burned when the factory burned in 1912. I cannot say there were any books or records in the factory at that time. I know we did have all the books and records in January, 1910.

“I also think Your Honor should know that I was all wrong about that long hand-peeling table which I said was an inspection table and was not built until 1904. That long table was built in 1903, and was a hand-peeling table, and women in 1903 sat along each side of it peeling peaches by hand. That is what it was built for. But I still insist that practically all of the peaches in 1903 at South Haven were peeled by lye machine.”

And then suppose S. J. Dunkley had arisen in court and addressed Your Honor somewhat as follows:

“I remember now about that long hand-peeling table being built in 1903. It, together with a slat or filling table, which was a continuation of it, occupied all but about ten feet of the entire length



of the main factory room. Women did sit along each side of it in 1903 peeling peaches by hand. I still insist, however, that a substantial part of the peaches peeled in 1903 were peeled by lye machine. I also remember about our having all of the old books and records in January, 1910.”

We respectfully submit that in this suppositional case any one of Your Honors would have been a good deal disgusted, and very promptly would have said that with the burden of proof resting on the plaintiff to antedate Grier, in view of the occurrences which had just taken place, you were unable to find that plaintiff had succeeded in sustaining the burden resting upon it.

But this is by no means all. To grasp the full force of the situation here presented, we should add to this suppositional situation that S. J. Dunkley had further addressed the court somewhat as follows:

“I think perhaps I should also tell Your Honor that I have succeeded in digging up a lot of letters which passed between Edwin Norton and O. W. Norton, my financial backers, and myself during the years 1902, 1903 and 1904. I got these letters from stacks of letters in the basement. I have not brought all of them here, but I have brought some of them.”

Continuing these suppositional occurrences, we should then have counsel for the defendant promptly asking permission to consider these letters as in evidence, and asking for a reasonable opportunity to examine them, and calling to Your Honor’s attention some of their salient features.

And this brings us to a consideration of these letters which both Judges Trippet and Hand concluded were entirely inconsistent with the Dunkley claim that the first model machine was built and tried out in the fall of 1902, and that the second machine built, being the three-line or commercial machine, was built in August or September, 1903, and that nearly all of the 1903 pack was peeled by lye machine.

#### 4. Dunkley-Norton Letters.

In order fully to appreciate the significance and importance of these numerous letters running over a period of some three years, they should be considered in detail and in connection with the full story of the Dunkley invention as disclosed in the Los Angeles trial. They appeared at the very close of the trial there at Los Angeles. They verified countless episodes and details related by the more than forty witnesses who had testified on the date of the Dunkley invention. These letters have been considered in this way before this court on the appeal of *Michigan Canning & Machinery Co., et al., v. Pasadena Canning Co., et al.*, Equity No. 3316, both in the oral argument and in the briefs on file.

Here we will endeavor to consider them as though merely superimposed upon the case made by the plaintiff at the San Francisco trial.

Preliminarily we call attention to the significant omissions in the chain of correspondence. The letters actually produced seem to have been carefully selected to cover periods of time much less critical than the

periods as to which no letters were produced. Frankness with the court and a true desire to reach the truth in regard to the date of the alleged Dunkley invention would seem to have called for the production of all the correspondence. There is, for instance, a complete blank in the correspondence for the critical time of July, August and September, 1903. The only explanation at any time ventured by counsel as to this significant omission was made in a reply brief filed in the New York case and was in the following language:

“There would not be any letter describing the peach-peeling machine prior to October 23, 1903, because the thing was in process of development and try-out, and the cannery was crowded to its full capacity, and people were working nights.”

The explanation is not very convincing in view of the infinite detail with which Dunkley related everything done in the factory. The facts conceded are in substance what petitioners claimed at San Francisco and as we now know them to have been. If accepted, there is nothing more to the litigation. Grier was first.

Again, in letters actually produced, there are references to other letters which it would seem probable would throw light upon the situation, but which were not produced. All this is quite significant, in view of the non-production of the books and records, coupled with the attempt made at San Francisco to lead the court to believe that the books and records had been burned.

Taking up these letters, we direct attention to the fact that neither of the two Dunkleys at the San Francisco trial could say that more than the two machines, the first or experimental model, one-line, wooden-frame machine, and the second or three-line, wooden-frame, commercial machine had been built prior to November 1, 1904. (See Pet. 15.) Certainly there is nothing in the testimony at the San Francisco trial which would justify the court in saying that there were other machines which had been constructed. (At the Los Angeles trial it was proven affirmatively that there were only these two machines, and we now have the affidavits of witnesses Augensen, mechanical expert for American Can Company, who was in 1904 assigned to the Dunkley factory and took careful note of the peeling machine being installed at that time; Brown, superintendent for Dunkley; Stewart Campbell, who made the machine; Geiger, who made the drawings for the patent attorneys from the machine itself; Harold, who installed the water pipes to supply the machine, and worked in the factory in 1904; Hetherington, who had charge of the operation of the machine after Campbell left; Newton, who was employed in the factory; Norton, vice-president Continental Can Company, the son of the financial backer of Dunkley, and his representative in Dunkley's factory; Robinson, factory manager Continental Can Company, formerly employed in experimental department of American Can Company and assigned to Dunkley factory in 1904; and Triece, who operated the machine during the season of 1904—all to the effect that the photographs introduced



in the Dunkley-Beekhuis interference proceeding as “Dunkley’s Exhibit No. 2, Photograph 1 of *Second Machine*,” “Dunkley’s Exhibit No. 2, Photograph 2 of *Second Machine*,” and “Dunkley’s Exhibit No. 2, Photograph 3 of *Second Machine*,” respectively, copies of which appear herein at pages 476, 477 and 478 of the appeal record, and which were asserted by Dunkley in the interference proceeding to represent the *second machine* built by him, are photographs of the machine which was first installed in 1904 and first used during the peach season of that year.)

Having in mind, then, that there were but these two machines, we direct attention to the following letters:

On October 29, 1903, S. J. Dunkley wrote from Kalamazoo to Mr. Edwin Norton that

“The South Haven factory is now closed up.”  
(L. A. Rec. 4124.)

In November 7, 1903, S. J. Dunkley wrote from Kalamazoo to O. W. Norton that

“We are now busy working on a NEW paring machine.” (L. A. Rec.)

Subsequent letters carry along the construction of this “NEW paring machine,” sometimes termed the “Rotaries,” and the lye tank therefor, which is sometimes termed in the correspondence the “prevaricator” or “Ananias,” through the winter of 1903-4, and the shipment of the machine and tank in the spring of 1904 to South Haven, and its trial and installation at South Haven, and its use through the 1904 season at South Haven.



To which of the two machines constructed prior to November 1, 1904, did this correspondence refer?

Obviously the second machine built, to-wit, the three-line, commercial wooden-frame machine. Both sides at the San Francisco trial claimed that the first machine built, to-wit, the model experimental machine, had been built prior to October 29. The Dunkleys said it was built and tried out in the fall of 1902. Campbell testified it was built in August, September and October, 1903, and successfully tried out on late peaches. Hence the "new paring machine" upon which they were busily working at Kalamazoo on November 7, 1903, could not have been this first machine. It must have been the second.

These letters show, then, that the second machine was not built and used during the 1903 peach season, as testified to by the Dunkleys at San Francisco, but on the contrary, its first use occurred during the 1904 season.

The framework of the model experimental machine is in evidence and before the court (Exhibit 10). The woodwork shows no trace of being eaten by lye. Lye destroys the woodwork. As Melville Dunkley testified at the San Francisco trial,

"The slop from the caustic soda getting on this wood cut it out, ate it up very rapidly, so that we started in the fall of 1904 \* \* \* and redesigned the machines, using cast iron for a framework." (S. F. Rec. 417.)

It is quite incredible, then, that the Dunkleys were correct in San Francisco in saying that at least 75%

of the pack in 1903 was peeled by lye machine. The commercial machine was not built at that time. Such extensive use of the model machine would have left unmistakable physical indications of its use.

But the Dunkley-Norton correspondence makes it clear that there was no commercial use of a lye peeling machine in 1903, but that the first use was in 1904, and that even this use was considered as experimental.

For instance, on March 23, 1904, Edwin Norton wrote to S. J. Dunkley in part as follows:

\* \* \* "Cranwell says we should be able to sell all the cheaper grades we can pack, and if our machines for peeling and pitting are successful, which we can be sure about, before the season opens, by getting southern peaches early. Then I hope we can just make a great pack this season and make up for lost time. \* \* \* Have you had any drawings or photos of the 'Annias' Prevaricator and the Pitter? I would like to see what they are like. When you get them set up I will come and see the machines." (L. A. Rec. 4140-41.)

Shortly thereafter and on June 8, 1904, Edwin Norton wrote S. J. Dunkley and said:

"As the market here is full of Early Peaches, I suppose you will soon be able to secure a sufficient supply *to make a real test* of our 'Anmanias' and the Pitting Machine. I consider this most important, so that if it is going to do our work well, we may know of it, in ample time, and arrange to do a very large pack, which *we could not probably do at the price we would have to pay*

*for labor under the old system.”* (L. A. Rec. 4153.)

On August 19, 1904, S. J. Dunkley wrote Edwin Norton:

“the prevaricator has been tested and is all right as well as the rotarys.” (L. A. Rec. 4161.)

On September 17, 1904, S. J. Dunkley wrote O. W. Norton in part as follows:

“The peeler works fine.” (L. A. Rec. 4164.)

On September 22, 1904, S. J. Dunkley wrote O. W. Norton and said:

“The peeling machine is running fine so are the rotaries.” L. A. Rec. 4165.)

Again in the same letter he says:

“The Lye machine takes \$2.00 worth of lye for 300 bushel of peaches, so it is not very expensive.” (L. A. Rec. 4166.)

It is absurd, of course, to think that references of this kind would be made if 75% of the 1903 pack had been handled by this very machine. The cost of lye would surely have been an old story to Dunkley’s financial advisers, if the lye machine had been used commercially in 1903 in the manner testified to in San Francisco.

These letters are significant in another aspect. This court, in its opinion ordering the affirmance of the interlocutory decrees in the San Francisco case, said:

“But accepting Campbell’s testimony as true in those particulars wherein he is corroborated by

other witnesses, we find he worked for Dunkley on a machine of some kind in 1903, but this does not identify the machine as the one Dunkley claims to have invented in 1902.”

Brunker and Mapes were the only other witnesses besides Campbell who were called. Brunker admittedly was at South Haven only during the 1903 season. Mapes’ books show entries for work done on the peach machine between September 28 and October 6, 1903. Hence as the second machine was not started until about November 7, 1903, and this at Kalamazoo, their testimony and the entries in Mapes’ books could have been referable to no other machine than the model or first experimental machine.

Three of the letters in this correspondence are urged by counsel for the Dunkley Company as corroborating the Dunkleys’ contentions.

The first of these is the letter of October 23, 1903, from Edwin Norton to S. J. Dunkley, which contains this statement:

“Their description of the perfect working of the peeling and grading machines for peaches are very interesting, and I am very glad with all the new things we have had on hand, this season, that all have worked out so successfully.” (L. A. Rec. 4122-3.)

The reference in the quoted paragraph to “*their* description” refers to Arthur W. Norton, son of Edwin Norton, and Melville E. Dunkley. It seems that at the close of the peach season, Melville accompanied young



Norton to New York for a visit with the latter's father, Edwin Norton.

If this letter had been written in 1902 instead of in 1903, it would have sustained the Dunkley story. As it is, it merely fits in with the contentions at all times made by the petitioners here (and the defendants in the subsequent cases), to the effect that the model machine was constructed during August, September and October, 1903, and was successfully tried out late in the season. Indeed, how else could Dunkley have expressed himself to inform Norton of the successful try-out of the first brush machine?

(Since these letters have come to light, they have been gone over by Mr. Arthur W. Norton, who is now vice-president of the Continental Can Co., and he is able to remember the sequence of events occurring at the South Haven factory. His affidavit is present and will be subsequently considered. At this point it is enough to call attention to the fact that he states in his affidavit that the peeling machine to which reference is made in this quotation was the model or experimental machine built during the 1903 season and which was successfully tried out on late peaches that year.)

The next letter urged as corroborating the Dunkley story is that of October 29, 1903, and is from S. J. Dunkley to Edwin Norton and is in part as follows:

“The South Haven factory is now closed up, and we have been working this last week on a Peach pitter and Mr. Campbell has already got out the working parts, and I think we have it so that



it will halve and pit the Peaches nicely and quickly from the peeler. I note by last week's Canner and Packer that there is a patent applied for a peeling machine for some one in California and on studying it over, it seems to be just a conveyor belt carrying the Peaches running between two tanks of lye with large adjustment wings to slide the Peaches into and out of the tanks on each side, the tanks being built in sections. I would like to cover our machines with patents and talked it over with Mr. Adcock when I was in Chicago last week and he thought the peeling device was patentable and the pitter certainly is, at least it looks that way." (L. A. Rec. 4124-5.)

There is, of course, nothing here in any respect inconsistent with the contentions at all times made in opposition to the Dunkley story. When this letter was written, the model experimental machine had been built and tested out. The pitting machine, as shown by the letter, was being built. Had the peeling machine, as claimed by the Dunkleys, been built and tried out in the fall of 1902, it is, indeed, surprising that S. J. Dunkley, who was accustomed to cover his new machinery by patents, delayed for a whole year taking the matter up with his patent attorney.

*Barber v. Otis Motor Sales Co.*, 271 Fed. 171.

*Amer. Sulphite Pulp Co. v. Howland Falls P. Co.*, 70 Fed. 986.

It will be observed that he was acting with great promptness in regard to the pitting machine.

The next letter relied upon is that of February 10, 1904, from S. J. Dunkley to Edwin Norton, and contains the following:

“In regard to the labor, we have figured that over carefully, and would say, we have the lye machine now nearly completed with the rotary cleaner attached. This machine Mr. Campbell calls the ‘Prevaricator.’ This we are sure will work as we worked the same thing last year, and there is no question about it.” (L. A. Rec. 4129.)

There is no question but what the model experimental machine was fully tested late in the 1903 peach season, and worked successfully. There is nothing of a very complicated nature about this machine. Grier, it will be remembered, did not even bother to make a small machine to prove out his conception, but started in at once and built two full size commercial machines, both of which were put into immediate commercial use. A reading of the entire correspondence will indicate that Dunkley displayed a good deal of the promoter’s optimism and exaggerated style, while the Nortons, the moneyed men of the concern, were more conservative and insisted upon tests and try-outs being made, before going too strongly on the strength of the success of new methods. (As to the effect of ambiguous documents submitted for the purpose of carrying back the date of invention, see *Hunnicut Co. v. Gaston Co.*, 218 Fed. 176, C. C. A. 3; *Twentieth Century Mchy. Co. v. Loew*, 243 Fed. 373, C. C. A. 6;

*Consolidated Ry. Co. v. Adams & Westlake Co.*, 161 Fed. 343, C. C. A. 7; *Thayer v. Hart*, 20 Fed. 693.)

Referring back to our suppositional situation, could any of Your Honors, in view of the irreconcilable differences between the facts set forth in this contemporaneous correspondence and the facts as testified to by the two Dunkleys from memory only, after a lapse of thirteen or fourteen years, have accepted their bare recollections, under the somewhat extraordinary circumstances here disclosed, as measuring up to the strict character of the proof required of them under the rule?

In the trial of the New York case, the new Dunkley Company, the plaintiff there, in an effort to attack one witness offered by the defendants at Los Angeles, produced and identified the Dunkley Company payrolls for the years 1902, 1903 and 1904. These, when critically examined, tell a very interesting story and one entirely inconsistent with the one told by the Dunkleys at San Francisco.

### 5. Dunkley Payrolls.

It will be remembered that at the San Francisco trial the Dunkleys testified that in 1902 peaches were peeled by hand by women sitting about small tables. (This fact is correct. It is so testified by all witnesses at all trials.) Melville Dunkley, however, testified at San Francisco that the only hand-peeling done in 1903 was by women sitting about small tables just as in 1902, and that there were but ten or fifteen or twenty

of them (S. F. Rec. 425), and that 75% of the 1903 pack was peeled by lye machine. The hand-peelers were piece workers. Other employees were generally paid by the hour.

Having in view this testimony by the Dunkleys in San Francisco, it would be expected, if their testimony is true, that the payrolls would show a large number of piece workers for 1902 and a decided drop in the number of piece workers (women hand-peelers) for 1903 and 1904. On the other hand, if petitioners' claim that the Dunkleys were antedating their story by one year is correct, we would expect these payrolls to show a large number of piece workers in 1902, about the same number in 1903, and a drop in the number of piece workers in 1904. What do they show?

The main peach season started about the middle of September. Starting then for each year with the week the major portion of which was after September 15, and each week thereafter until what is estimated to be about the end of the peach season, we have the following:

1902		No. of	No. of
Week Ending		Time Workers	Piece Workers
Sept. 20		159	104
" 27		171	89
Oct. 4		155	101
" 11		157	91
" 15		33	36
" 18		54	...
	Total	729	421
	Average	121	70

1903			
Week Ending		Time Workers	Piece Workers
Sept. 19		116	108
" 26		105	123
Oct. 3		103	94
" 10		67	75
" 17		41	58
" 21		18	26
	Total	450	484
	Average	75	80

1904			
Week Ending		Time Workers	Piece Workers
Sept. 24		187	21
Oct 1		223	9
" 8		226	7
" 15		260	23
" 22		256	1
	Total	1192	61
	Average	238	12

There appears in the record of new matter before the court a rather curious verification of the figures here given. On October 1, 1903, there appeared in the South Haven Daily Tribune, a newspaper article



entitled "Canning Factory Is a Busy Place." L. L. Crosthwaite wrote the article after a personal inspection of the factory. This article states that

"About 160 persons, mostly women, are engaged in the canning departments and 60 in the other departments. The parers work by the bushel, but all other women work by the hour. Women receive 10c to 12c per hour and men 15c to 17½c per hour. Many work extra time in order to make larger wages." (Rec. on Appeal, 424.)

Again, we find the "ten or fifteen or twenty women" which Melville Dunkley at San Francisco testified were peeling peaches by hand at small tables in 1903, not in 1903 but in 1904, the payrolls showing there were approximately this number of piece workers in 1904, while the number of piece workers in 1903 was greater even than it was in 1902.

We reproduce portions of this article here for the convenience of the court, the photograph appearing at Appeal Rec. 424 being considerably reduced in size.

#### "CANNING FACTORY IS A BUSY PLACE

"One of the busiest places in South Haven at the present time is the canning factory of the Dunkley Co., which is now canning and pickling about 600 bushels of peaches per day.

"The various operations through which the fruit passes from the tree in Michigan to the table in the east, west or far north would make a long story,"

\* \* \*

"The peaches are received from the growers, wagons on a long platform along the north side of the building" \* \* \*

“Mr. Wm. Brunker, who has charge of the preserving department, has done a great deal of experimenting in order to make a successful pickled peach in large quantities, and he is now turning out 150 to 200 bushers per day” \* \* \*

“The fruit to be canned is carried in crates which hold one bushel each to the women who do the paring and pitting, who sit at two long tables between which passes a slowly moving belt, about twelve inches wide. The women pare with machines or by hand, some who are very expert preferring to pare by hand as they receive 30 cents per bushel, while the machine workers receive 20 cents for firsts and 25 cents for seconds.” (Note: The “machines” referred to are the little rotary hand-machines shown in the long table picture, Defendants’ Exhibit 3a, L. A. Rec.)

“The peaches being pared and pitted are then inspected by two women who, if the fruit is all right, turn it on the belt and it is carried toward the canners. As the half peaches leave the belt they are washed by an automatic washer and fall on a slatted carrier about three feet wide, which carries them for some distance through a steaming apparatus. Coming from this the fruit is put in cans, which are filled tight, then go to the syrup fillers, after which they go to the vacuum machine. Five cans are put in the machine, after the lids are laid on, and all the air is extracted from them, after which a presser comes down and the lids are forced into place.” \* \* \*

“After leaving the seamer the cans are put on an endless carrier, which takes them through boiling water” \* \* \*

“About 160 persons, mostly women, are engaged in the canning department, and 60 in the other departments. The parers work by the bushel, but all other

women work by the hour. Women receive 10c to 12c per hour and men 15 to 17½c per hour. Many work extra time in order to make larger wages." \* \* \*

"Besides the tin cans, of which they turn out about 425 cases per day, they are putting up a great deal of choice fruit, peaches, pears, plums, etc., in glass."

"The company has a dormitory which accommodates about 75 women, and a dining hall which feeds from 75 to 100. The rates are made reasonable and many who come from a distance avail themselves of them, but a very large proportion of the help are residents of South Haven."

We next direct the court's attention to the newspaper article appearing in the South Haven Weekly Tribune-Messenger of April 22, 1904, as a reprint from the South Haven Daily Tribune of April 19, 1904.

#### **6. Newspaper Article of April 22, 1904.**

This article is entitled "Improvements to Canning Factory," and is set forth in full at page 33 of the petition. It is appropriately verified by L. L. Crosthwaite, the reporter who wrote the same, and whose recollection is that the information upon which the same was based was given to him by S. J. Dunkley. No denial or correction of this article appears in any subsequent issue of said paper. S. J. Dunkley apparently read all of the local items affecting the factory (L. A. Rec. 1455), and was himself a stockholder in the South Haven Tribune (L. A. Rec. 1737). It is incredible that an article like this stating that the new peeling machine was to be used for the first time in the 1904 season could have gone unchallenged, if the

Dunkleys were correct in saying that 75% of the pack was peeled by this very machine the preceding year. Things like this do not happen. On the other hand, this article fits in appropriately with the story told by the Dunkley-Norton correspondence.

Perhaps no one was in a better position to know just what happened in 1903 and 1904 than Arthur W. Norton. He was the son of Edwin Norton, the financial backer of Dunkley, and was at the Dunkley factory at South Haven each year, ostensibly as an employe, doubtless in fact to look after his father's extensive interests there. He was an intimate associate of Melville Dunkley.

This brings us to the last item of new matter under the grouping we are considering, namely:

#### 7. Arthur W. Norton Testimony.

Arthur W. Norton, who is vice-president of the Continental Can Co., lives at Baltimore, Md. Until he read the Dunkley-Norton letters, the sequence of events at South Haven was not clear to him. Upon reading these letters, however, events became clear, and he remembers and has made, and there is now before this court, his affidavit in which he states directly and positively that "the model or experimental machine without any lye tank was built in the fall of 1903; that it was successfully tried out on late peaches; the following year the lye tank and a three-line peach-peeling machine were constructed, installed and used for the first time in the season of 1904." (Rec. on App. 206-215.) He identifies a photograph of Exhibit



10, the framework of the model experimental machine as the framework of the machine referred to by him as having been constructed and tried out in 1903. His testimony, of course, conflicts directly with the story told by the Dunkleys at San Francisco.

If the facts disclosed by the Dunkley payrolls, the April 22, 1904, newspaper article and the Arthur W. Norton affidavit be brought into the suppositional case we have mentioned, can there be any doubt as to the result? There is nothing left of the Dunkley story as given at the San Francisco trial. The basis of the startling change of testimony there from their Patent Office testimony is destroyed. The only documentary proof relied upon by the Dunkleys is eliminated. Their excuse for the non-production of books and records is gone. The long hand-peeling table, the construction and use of which in 1903 is utterly inconsistent with their story, is brought in. Essential features of their story are broken by the contemporaneous Dunkley-Norton correspondence. The article in the South Haven paper is utterly inconsistent with essential features of their story, and lastly, Arthur W. Norton testifies that the model machine was built in the fall of 1903 and tried out on late peaches, and that the commercial machine was built the following winter, and that the first commercial use of the lye peeling machine occurred in 1904. *If the many decisions announcing the burden of proof in such cases mean anything at all, they mean that a patentee cannot antedate his patent by any such showing as this.*



(c) **New Matter Set up In Paragraph IV of the Petition—Diligence in Its Presentation.**

In considering the question of diligence, two queries suggest themselves:

1. Could or should this new matter have been presented at the trial at San Francisco?
2. Are petitioners in time in presenting it here?

The changes in testimony by the two Dunkleys, of course, could not have been presented when these cases were tried. The changes were not made until long afterwards. The Dunkley-Norton letters and the Dunkley payrolls came to light long after the trial. Melville Dunkley, at San Francisco, testified that all records were lost or destroyed. No rule of diligence of which we have ever heard would require a party to present records in the possession of his adversary which such adversary testified had been destroyed. The newspaper article of April 22, 1904, was not discovered until long after the trial. Could it have been discovered before? Counsel for defendants in the Los Angeles and New York cases made most exhaustive searches for any such an article at newspaper offices, public libraries and even at the homes of persons represented to have kept old papers, and neither the 1904 file of the paper or the issue containing the article was at any of these places (Record on Appeal 67, Pet. 37-8), which answers the query. A search for it before the trial would have been unavailing. Arthur W. Norton might have been located and his testimony taken. His testimony, however, would not have helped. It

was only after he had read the correspondence passing between his father and his uncle on one side and S. J. Dunkley on the other, that his memory was refreshed and the sequence of events at South Haven became clear to him, so that he could remember and was able to testify to the facts stated in his affidavit (Pet. 39.) These letters were not unearthed until long after the trial. Hence it is clear as to the new matters grouped under paragraph IV, there was no lack of diligence.

As to the presentation here of these matters, but a word seems necessary. There is no definite time limit on applications of this character.

*National Brake and Electric Co. v. Christensen*,  
254 U. S. 425, 65 L. Ed.—(January 3, 1921).

*John Simmons v. The Grier Bros. Co.*, decided  
by Supreme Court February 27, 1922.

*Barber v. Otis Motor Sales Co.*, 271 Fed. 171, C.  
C. A. Second Circuit, (February 9, 1921).

*In re Gamewell Fire-Alarm Tel. Co.*, 73 Fed.  
908, *supra*.

Laches implies prejudice. The decrees sought to be reviewed here are interlocutory. There has been no accounting. The taking of an account has been allowed to drag.

Aside from this, the petition shows that these petitioners have sought diligently, though unsuccessfully, to open up these decrees. Before the trial of the Los Angeles case and immediately upon discovering that the plaintiff at San Francisco had parted with its title prior to judgment there, they rushed to this court

seeking relief upon this score, and as an equitable backing to their application, pointed out in very brief general terms what they believed would be developed at the approaching Los Angeles trial as to the underlying merits of the controversy. They were wrong in this effort, and this court promptly denied them relief, and remanded to the lower court the determination of the effect of the assignment of patent. Both sides then awaited the termination of the Los Angeles case. Then plaintiff below sought to get its assignee into the case. The petitioners sought to get the case opened up for the reception of the new evidence brought to light at the Los Angeles trial, both as a condition upon the assignee being admitted as a party, and also by a motion that the lower court ask this court for permission to reopen. The whole matter dragged at the instance of the judge of the lower court, who desired to await the decision of this court on appeal in the Los Angeles case. Finally failing to get relief in the lower court, the petitioners have come here. Efforts, though ineffective, to secure relief, show diligence and tend to negative laches. (*Southern Pacific Co. v. Bogert*, 250 U. S. 483, 63 L. Ed. 1099.)

### III. New Matter Grouped Under Paragraph VII of Petition.

It is our view that it is unnecessary for this court to consider this except as it bears on the underlying equity of these applications. If we are wrong in this,

then the questions of materiality of the new matter and diligence in its presentation arise.

**(a) Materiality.**

The materiality of this evidence has been vouched for by Judges Trippet and Hand. Nearly all of it has been before this court on appeal from Judge Trippet's decision. It was then fully argued, both orally and in briefs on file. Judge Trippet's decision was affirmed. The evidence is referred to with considerable definiteness in the petition. Many references to the record are there made. The general effect of the new evidence has been heretofore stated herein. To say more now on this point would seem to be a work of supererogation.

**(b) Diligence.**

Should this matter have been presented at the trial?

The reason why none of this evidence was presented at the trial is stated in the affidavit of William K. White, counsel for defendants at San Francisco, and the person in charge of the preparation and presentation of the case there. See Appeal Rec. pp. 269-277.

Does this excuse the non-production of this evidence? The rule in regard to diligence in such matters should be given a common sense application. If counsel for the petitioners at the San Francisco trial did all that a prudent and careful practitioner would have done under the same circumstances, these petitioners should not now be penalized because he did not do more.



Surely Mr. White, in preparing the case, was justified in assuming that the two Dunkleys would not retract testimony given by them in 1910. This being so, he was not chargeable with lack of reasonable diligence in failing to look for and present a mass of evidence to show that the Dunkleys did not build the first model machine in 1902, nearly a year earlier than they had specifically given in 1910 in the Patent Office proceedings, as the date of its construction.

What has already been said as to the timeliness of the presentation of these matters set out in paragraph IV of the petition before this court, applies with equal force to the matters in paragraph VII.

In any event the lack of diligence is merely a matter for the assessment of *terms*.

*Barber v. Otis Motor Sales Co.*, 245 Fed. 945.

## V. Decision of Judge Van Fleet on Petitioners' Applications That He Request This Court for Permission to Reopen.

This decision and its effect is considered to some extent in the brief on appeal from his decision rendered at the same time on the motion of the old Dunkley Company to add the new Dunkley Co. as a party.

The fact that Judge Van Fleet refused to make the request does not in any way affect the right of the petitioners, under *National Brake & Electric Co. v. Christensen*, *supra*, to come here with these applications. No appeal lies directly from his order refusing to make the request. Except as his action may be



deemed involved in his other order, these petitioners have no way in which to secure the views of this court upon the materiality of the new matter now available, except by these applications. As to the *weight* to be given his decision, we call attention to the following:

*1st.* Judge Van Fleet entirely misconceived the rule as to where the burden of proof rested. He was, it is apparent, of the opinion that the burden of proof rested upon the defendants in the original trial, *to show that Dunkley was after Grier, by clear and convincing proof.* The reverse of this obtains, under an unbroken line of authorities. *It was for the Dunkleys to show that they were before Grier by such proofs.* The cases cited by him are applicable to the Dunkleys, and not to these petitioners. *Symington v. Nat. Malleable Casting Co.*, 250 U. S. 383-6, 63 L. Ed. 1045, and the *Barbed Wire case*, 155 U. S. 286, 300, weigh against the Dunkleys and not against these petitioners who did establish the Grier dates by the kind of proof required to establish an anticipation. Had he not thus gotten the rule as to burden of proof turned about, it seems incredible that he could have reached the conclusion he did.

*2nd.* He fell into the error of thinking Judges Trippet and Hand based their decisions upon Stewart Campbell's testimony. As we have pointed out before, Stewart Campbell played a very unimportant part in the subsequent trials. His testimony could have been entirely eliminated, and the situation would not have been changed. We think it is reasonably clear

that Judge Trippet's references to Campbell were with a view of correcting an injustice that was done him by prior decisions. The testimony of many witnesses did show that he was a truthful but perhaps unprepossessing witness. We again direct the court's attention in this connection to the statement heretofore made of the Dunkley story as established by the new evidence. The court will observe that no reference is there made to Campbell's testimony, but that his connection with the various events is proven by the testimony of numerous disinterested witnesses.

For these two reasons, if none other, we respectfully submit that this court, in passing upon the question of the materiality of the new matter here presented, should not be influenced by this decision.

### **Dunkley Has Contributed Nothing to the Art. Patent Void for Other Reasons.**

It is our earnest contention that S. J. Dunkley has never contributed anything to the peach peeling art. The Dunkley machine, regardless of its date, was never a success. It consisted principally of a set of bristle brushes. The system of peeling, as practiced by Dunkley, was to subject the peaches to the lye *prior* to halving and pitting them. This required the impossible performance of halving these peaches subsequently by hand, or the making of another machine to automatically extract the pits therefrom. These so-called "pitting machines" were also failures, for the reason that the peaches were necessarily mutilated by the use of them. The uncontradicted testimony is that Dunkley

himself is the only person who ever used the Dunkley machines commercially (with the possible exception of one small plant somewhere in Michigan) and Dunkley went out of the canning business in 1908. These machines were brought to the coast in 1905, and tried out by the California Fruit Cannery Association, and were found to be failures.

*The secret of the success of the lye peeling machines lies in splitting and pitting the peaches FIRST, so that the handling of the slick lye-treated peaches is avoided.* This was discovered by Pyle in 1901, and by Grier, Roach and Vernon in 1902.

With respect to the so-called "peeling jet," it may be stated that it developed in the trial of the Los Angeles and New York cases (L. A. Rec. pp. 2887-8) that Dunkley did not install a pump to assist the pressure until 1905, dependence being had upon both water and brushes, as held by the Patent Office. If, therefore, a "peeling jet" is the essence of the Dunkley invention, his machine was anticipated regardless of the truth or falsity of his testimony here.

Furthermore the patent is void in not setting out the amount of the pressure required. (*Williamette Iron & Steel Works v. Columbia Eng. Works*, 252 Fed. 594, 596, C. C. A. 9; *The Incandescent Lamp Patent*, 159 U. S. 464, 474.) *It will be noted that the patent does not specify the amount of pressure to be used.*

The machine which Dunkley now manufactures is a pirated machine. It has no brushes; it bears no resemblance to the machine of the patent whatever. It

is modeled after the Grier, Beekhuis and Monte types of machine. Dunkley's alleged invention is a "paper" one. He demands an oppressive monopoly without a single contribution to the art. He has taught the great peach peeling industry of this country nothing. The object of the patent law is to encourage the conception and disclosure of inventions by giving the monopoly to the first and original inventor. These laws were not intended as instruments of injustice, nor were they designed to shield and protect one who is not the first inventor, giving to him oppressive privileges to which he is not truly entitled.

### **Conclusion.**

Defendants having established conception and reduction to practice by Grier at dates prior to Dunkley's application for patent, the burden of proof shifted to plaintiff to show earlier dates than Grier by proof "beyond a reasonable doubt" or at least, by a "very clear and convincing" evidence.

As the record now stands not only has the plaintiff failed to sustain this burden, but defendants have affirmatively shown by overwhelming evidence that Dunkley (or Campbell) did not conceive his alleged invention until late in August, 1903, and that it was not reduced to practice by the completion of the experimental model machine until after October 6, 1903, dates subsequent to those of Grier. In the case at bar we have approximately fifty witnesses whose testimony was introduced in the Pasadena and New York cases, contradicting the testimony of plaintiff as to



the date of invention. Under the decisions it is only necessary to create a doubt in the mind of the court as to the prior date claimed by the inventor. In the Pasadena case, however, Judge Trippet was so clear on this issue that he found

“The first or model machine ever built by Dunkley to peel peaches by the lye process was built in the autumn of 1903 and no machine at all was built in 1902. The evidence heretofore stated tends strongly to prove that the Dunkley conception was not made until the summer of 1903 and that Mr. Dunkley is wrong in his claim of the conception at a prior date.”

He added:

“It seems proper to say that the evidence convinces the court of the above conclusion beyond a reasonable doubt.”

The fact that a trial court, after listening to the testimony embraced in this voluminous record, and having had the benefit of viewing the witnesses upon the stand, came to the positive conviction above quoted, and that subsequently another trial judge upon the same record found similarly, ought of itself, it seems to us, be sufficient to create that element of doubt which now as a matter of law brings the case at bar within the rule.

We most earnestly submit that the petitions of plaintiffs herein for leave to file in the court below original bills in the nature of bills of review should be granted.

Respectfully submitted,

KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENNEY,  
*Counsel for Petitioners.*













